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>> TRACIE DeFREITAS: Hello everyone and welcome to the Job Accommodation Network's Monthly Webcast Series. Today's webcast is entitled "ADA and Accommodation Lessons Learned: COVID-19 Edition".

I'm Tracie DeFreitas, JAN Principal Consultant and ADA specialist and one of our featured speakers today. But I'm pleased that Teri Weber, Senior Vice President, Spring Consulting Group will join me for today's program, as well. Thank you, Teri. Before we begin I need to go over a few housekeeping items. First if 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.

Second, questions may be submitted during this presentation using the question and answer chat pod located at the bottom of your screen. To use the pod, just type in your question. And then submit to the question queue. Questions may be sent to our email account at question@askJAN.org, as well. And that can happen at any time during the webcast.

And time permitting questions received via the chat pod will be answered at the end of the presentation, if we're able to do that.

On the bottom of your screen you'll notice a FileShare pod. If you have difficulty viewing the slides or would 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. We really appreciate your feedback. So please stay logged onto fill out the evaluation form. And now I am pleased to introduce my co-presenter today. Teri Weber. Teri is a Senior Vice President with Spring Consulting Group where she works with employers to solve employee benefit challenges. Including absence management which aligns very closely with what we are covering today. Teri is on the Board of Directors for the New England Employee Benefits Council. And served as lead editor for the Disability Manager Employer Coalition's Return to Work Program Manual. Thank you for joining us today, Teri.

>> TERI WEBER: Thank you for having me.

>> TRACIE DeFREITAS: Let's get started. So good to have you.

So let's get started with our discussion. So it's been about a year since the COVID-19 pandemic forced businesses to abandon a conventional perspective on where and when and how work is performed and to adopt flexible policies and practices to meet business objectives and keep people safe and businesses operating.

We've learned a lot of lessons about the legal landscape as it relates to employers' responsibilities and workers' rights and limitations in performing job duties. And about strategies for engaging in the Interactive Process in a pandemic world.

As well as about implementing practical solutions, accommodations, if you will, to address evolving workforce needs.

Now, the purpose of our discussion today is to share some of the lessons we've learned when applying Title I of the Federal Americans with Disabilities Act, the ADA, or Section 501 of the Rehab Act for those Federal employers and employees out there.

And implementing accommodations secondary to the broad impact of -- accommodations secondary to broad impact of employees with conditions.

Of course the situation continues to evolve. And we only have some limited time today. So Teri and I have selected some of the more significant lessons to share. Of course there are many others. But we're just going to highlight some. Maybe there will be a future follow-up lessons learned. But we tried to pick those we thought would be most relevant to our listeners today.

On the next slide, I would like to talk a little bit about the Federal employment landscape. It's very expansive and complex as it relates to COVID-19.

The ADA medical inquiry rules, Interactive Process and job accommodation requirements, mitigating direct threat and safety risks and applying leave as an accommodation are some of the many issues at the forefront, which makes it critically important for employees to look at the ADA to inform certain employment decisions.

But we would be remiss, of course, if we didn't mention that various Federal and state and local laws can interplay with the ADA or cancel out the ADA in a pandemic situation.

Here we include several Federal laws that employers must be cognizant of. Like the Family Medical Leave Act, the expired Families First Coronavirus Response Act. The Pregnancy Discrimination Act and the Age Discrimination in Employment Act and of course Occupational Safety and Health Administration standards and directors, as well.

So this leads us to our first lesson related to ADA compliance and the Interactive Process. So we're going to kind of stay focused on ADA and engaging in the Interactive Process as we move through these lessons learned, even know that there might be other Federal statutes that could come into play.

Now, we know that workplace compliance can be complex. Federal laws cover a wide landscape of COVID-19 pandemic issues from worker safety to accommodations to leave.

We also know that employers have made and continue to make work-related adjustments like flexible work arrangements to meet business needs and keep people working for all sorts of reasons.

When an individual requests a change at work for a reason related to the COVID-19 pandemic, the employer should initiate the Interactive Process to gather information and establish whether the individual has the right to receive an accommodation for a medical reason under the ADA.

So it's important to engage in an Interactive Process to gather information and sort of check off those boxes to decide what law or laws apply based on the facts of this situation.

So the lesson here is to know the basis for the accommodation request and to apply a flexible practical approach to making modifications based on what's known about the need for accommodation.

So what we have learned is that there are many reasons why employees request work-related modifications around COVID-19. But the ADA will only apply when a worker has a medical reason of their own for requesting accommodations.

Not for reasons related to age being a risk factor or to prevent exposing a family member or a housemate or even for reasons related to an ordinary pregnancy where there's no pregnancy-related impairment. So in these examples other laws might apply like those mentioned earlier but not the ADA. And we'll expand on these in just a moment but it's important to apply a practical flexible approach to making modifications to keep workers safe in a pandemic but also recognize when someone is leveraging the ADA to receive an accommodation.

Teri, what's your experience with this lesson?

>> TERI WEBER: Yeah, thanks so much. You know, this is an interesting lesson to apply. Because I think -- and as we prepare for this, we talked a lot about how the ADA really hasn't changed because of COVID. But sometimes the employers' response has changed. So I think that employers who have already had a really practical flexible approach and been engaging in the Interactive Process don't really need to change too much. But I think the key is and the lesson to learn here is with the response to COVID, I think employers became even more flexible and even more accommodating, which is great.

But sometimes they may have stumbled a bit in lumping those requests like you were just mentioning a moment ago, age-related questions or family member-related requests into ADA or into their ADA process. And you know, certainly we were all drinking from a fire hose related to COVID-19. But I think if you're listening and you're one of those employers who has done that, we need to really step back and think about when and if ADA truly applies.

And if not, then there might be other state laws that might be able to protect these employees. Laws like FMLA. Or your state disability plans. Your state paid family and medical leave plans. Even plans like earn sick that might have jurisdiction at the state or local level. So absence is always this moving target. But we need to be careful to keep ADA really just with the ADA path, making sure they meet the definitions as we'll outline throughout the rest of the presentation.

>> TRACIE DeFREITAS: Thank you so much, Teri, I appreciate that.

So the key is to engage in an Interactive Process. And proceed based on the fact of the situation. You want to keep a practical flexible approach in mind. And to also recognize the keys to compliance.

So keep your state's issued mandates and requirements of the Interactive Process in mind, as well.

So we're going to move to the next slide.

And I apologize, I know there seems to be a good bit of issues with the audio. On my behalf. And I'm not sure. We've been having some difficulty with that. We're working on it.

So bear with us. As we try to figure that out.

Okay. So when is the ADA triggered? So because an employee or applicant requests a change at work for a medical reason, you do want to determine if the individual has an ADA disability. For example, when an employee has a medical condition that puts them at high risk for developing serious illness from COVID-19, they may request reasonable accommodations related to that impairment to limit the risk of exposure. Additionally if an individual has an underlying impairment that's exacerbated by having had COVID-19 or has an impairment that's exacerbated by a situation related to COVID-19 such as a pre-existing mental health condition, reasonable accommodations might need to be considered. So it's not clear yet whether having had -- having COVID-19 or having had COVID-19 or its aftereffects will meet the ADA definition of disability. But someone who has lingering limitations after recovering from COVID-19, someone with long COVID-19 or long hauler as they are referred to, can request accommodations. So if related to limitations are substantially limiting and create work-related issues, it will be up to the employer to decide if the ADA applies. Like any other ADA situation.

We're watching for guidance from the Equal Employment Opportunity Commission on this topic. But for now, that practical approach might be prudent. JAN just today published a new resource on this topic. This is: Accommodating Employees with COVID-19-Related Symptoms which you can find on the COVID page right off the homepage at askJAN.org. That's a-s-k-j-a-n.org.

All right. So still moving on with the lessons learned. The next lesson is about processing accommodation requests.

In the early months of the pandemic, employers were faced with an evolving situation and had to make decisions quickly. Some didn't follow their organization accommodation procedures. And seemed to think the Interactive Process had changed because of COVID. Why not, everything else did, right?

So however, nor the ADA or the interactive accommodation process changed. But we believe that the pandemic circumstances affecting the workplace will likely inform future accommodation policies and procedures.

Teri, would you mind talking about some of the lessons related to some mishaps in checking and maybe processing accommodation requests and creating silos related to that information that might be needed?

>> TERI WEBER: Yeah, I would be happy to. And in some ways it builds on what I was saying a little bit ago that I think we were all really doing the best we could when COVID-19 hit for those of you who manage ADA accommodations as a main part of your job, you likely saw just the volume of requests skyrocket so everyone with the best of intentions was trying to figure out how do we meet this demand. And because of that, I think that the process for evaluating accommodations changed at some sites. And it was a little bit of a necessity just getting bandwidth and volume. But some things that really changed and maybe not for the better is in some cases employers started not requiring paperwork. Partially because of volume. Partially because doctors' offices were doing more virtual visits. It was becoming difficult for employees to get the documentation. And so really what ended up happening in a lot of cases is just a lack of consistency. And I think what we are learning is that we need to be flexible. We need to treat every accommodation as it is unique you know like a snowflake for those of you in New England. You know, we need to treat each a little bit individualized. But at the same time, we have to have consistency.

I also think that another challenge that came up is managers are taking more things just into their own hands. Which created some silos where accommodations in your absence team or your individual or external providers that might help in this regard weren't necessarily in the loop.

We had a lot of people potentially working from home. People that needed I'll call them accommodations but they might not actually have been ADA accommodations. But to stay home, to get equipment at home. All of those various requests that came in. And when the Accommodations Team or whoever was assigned that might not be able to meet the capacity, I think managers started filling in.

And so again, I think to Tracie's point, we don't want to look back and reflect negatively. I think we were all doing the best we can at that time but it's really time now to evaluate what was done previously. Make sure that only your ADA accommodations are falling into those processes and try to find out if you do have any silos that have kind of been created that you work through a better communication path so you reduce or eliminate those.

>> TRACIE DeFREITAS: Those are great tips Teri thank you very much really appreciate that. Just to point out on the slides you will notice that there are some resources that are starred. These are resources that you can take advantage of. They are all linked at the end of the PowerPoint. These resources related to the lessons that we're presenting here today.

All right. Moving to the next slide. The next lesson is related to flexible work arrangements and employer policies and practices that might support modifications without triggering the ADA or requesting medical information. Due to COVID-19, businesses have implemented policies that allow and sometimes require employees to work in flexible ways to maintain business operations. But while some workplaces have embraced this flexibility, others still only offer flexible work arrangements either as a privilege or a benefit of employment. Or a job accommodation provided only to employees with disabilities who qualify when reasonable. So employers who are asked to provide flexible work arrangements must sometimes decide whether to request information or an explanation from an employee to approve this type of request. When flexible work arrangements are generally allowed as a policy or a practice, often no further information is required and the ADA isn't triggered. (Audio cutting in and out). For medical information when the employee requests access to workplace flexibility for a medical reason.

And this is when it's important to keep the ADA in mind. So using a familiar idiom, if the flexible work arrangement in an employee with a medical condition is asking for is something that any employee would or could ask for, an employer shouldn't require an employee with a medical condition to jump through unnecessary hoops. For example, to provide medical information when employees without -- when employees without disabilities are not required to provide it.

This is treating someone differently just because a medical condition is the reason for the requested flexibility.

So knowing when it might be appropriate to engage in the Interactive Process under the ADA will depend on whether an employee with a disability is requesting access to a workplace flexibility that's available to other employees or if they are requesting access to flexibility that really goes beyond the parameters of the employer's policy or practice. Whether the employee is requesting an exception to something that an employer is already allowing. And if it's for a medical reason. So that's something to keep in mind.

And I think it comes back to some things that Teri mentioned earlier is paying attention, is this an ADA situation or is it not. Teri is there anything that you would like to add to this lesson?

>> TERI WEBER: Yeah, the one thing I would like to add here is managers are really a critical linchpin with accommodations.

We know that the EEOC and others have given us guidance that we really need to not look at this at a manager level or a business unit level but always be looking at accommodations and definitions around hardship and reasonability as a company, company-wide view. But I think managers are really an important linchpin here. And the challenge is some managers are just generally more flexible than others.

So what Tracie is commenting here about making sure we don't treat workers with disabilities disparately and make them jump through hoops that employees with disabilities wouldn't have to for a similar accommodation, it's our jobs as folks that are looking at accommodations corporate wide to make sure that's not happening at the business unit level. So if someone's job requires them to be onsite, which is just an easy example for us to grab with COVID, then that needs to be everyone who is in that job classification, not just people in that job classification that work for a certain supervisor. So we're going to need to be really careful as we come back from COVID and peoples' worklife starts becoming more like our prior normal -- I hate to use the word normal. Who knows what normal will be in the future. But as we start returning to the workplace, we need to make sure we're looking corporate wide and that this flexibility is not just considered for each individual manager level but also just your whole company-wide view needs to be flexible but also consistent.

>> TRACIE DeFREITAS: Absolutely. Thank you so much.

Okay. So I think we'll move to the next lesson.

Where we're talking about -- we're getting -- you know, thinking about when it is necessary to ask for medical information or ask medical inquiries. It's an important topic to discuss. Because we've mentioned, of course, that can be part of determining if the ADA applies based on whether or not somebody has a medical condition or a disability. So it's an important step in the Interactive Process when the medical condition and/or the need for the accommodation is known to the employer. So early in the pandemic situation, it was difficult to obtain medical information for various reasons. So for example, the healthcare system was burdened. People didn't feel safe visiting a healthcare provider. And some providers were not seeing patients at all for some time.

We know that the ADA rules related to requesting medical information didn't change due to COVID-19. But the circumstances have impacted how and what information is gathered. The EEOC technical assistance resource, what you should know about COVID-19 and the ADA, the Rehab Act and other EEO laws does note that employers can adapt that process for collecting medical information either to require medical information or to use different forms of documentation than would ordinarily be required. Or to not collect it all even.

So these are some things to keep in mind.

Also, you can include end dates for approved accommodations to suit that ever-evolving situation based on public health directives. Because given the current circumstances, we just don't know how long it might be necessary to accommodate a situation.

And that could be dictated by the current circumstances.

Note that medical documentation is not required for an employer to approve an accommodation under the ADA but the employer does have a right to request it when it's job related and consistent with business necessity.

Of course employers are encouraged to consider various means for accepting information so consider whether the employer already has sufficient information on file about the impairment and limitations. You could accept of course telemedicine consults from an appropriate provider. You can also see authorization to communicate directly with the individual's healthcare provider. Or as I said, you could also approve the accommodation requests without obtaining medical documentation at this time. But you want to document that it can be requested at a later date if it's needed. So that's something to keep in mind. Just because you did not choose if that's the route that you take to request documentation, it doesn't mean you can't come back later if you determine that it's necessary but it's important to document that you're not asking for it now but it might be needed -- if it's needed at a later time, you could go back and do that, if it's necessary.

So just some things to keep in mind, with regard to that.

All right so we'll move to the next slide. Related to lessons learned in temporary accommodations. Now, I mentioned end dates and -- on the previous slide and this is where an employer approves the reasonable accommodation up to a certain date and this is particularly important given the evolving pandemic situation because accommodation issues can change based on COVID-19 risk factors, mitigating measures and business operations.

At JAN we have always suggested temporary or trial accommodations. But in the context of COVID-19, this strategy is one to really add to and keep in your accommodation playbook but I think it's really important. Teri I'm going to ask you, why does it make sense to approve temporary reasonable accommodations related to COVID?

>> TERI WEBER: You know, I always think we want to err on the side of the employee. And I think as we were dealing with COVID-19, a lot of us -- none of us really knew what to expect.

I think it's always better to try to be flexible and offer a temporary accommodation. Act in good faith. And assume that the employee is acting in good just to at a minimum see if it works, see if it bridges the gap. Again, a hardship is a difficult thing to prove at times. If you try it out and you can realize that it does work, that there is some kind of compromise that can be done, then it's really best for the employee and the employer to find that middle ground and if for some reason it's not, you know, we have gotten guidance that tells us, just because you allow an accommodation for a certain period of time doesn't mean it has to be ongoing and certainly an accommodation with no end date isn't really reasonable.

But I think any time where you feel like there is an opportunity to explore an accommodation, you owe it to yourselves and your company and your employee to really give it a shot and to really try to make the most of it. I also think, too, that these trial accommodations were necessary because everything was new.

We were still getting data.

And so the idea of what a disability was going to be what was going to impact things due to COVID-19, I'm not sure any of us really knew that.

And I think the other thing I would want to say is just because you give a temporary accommodation, you don't need to feel like you've opened the floodgates forever. You want to be mindful and methodical about what accommodations you approve. And do really sufficient and strong follow-up as to when that accommodation is coming towards close. What are the next steps? Follow up with additional medical if it's appropriate. Follow up for additional insight if there's a return to work coming. Don't just put no end date on something. Let's use some rigor to help not only bring an employee back if it makes sense but also to see if the accommodation is fluctuating. But I also think, you know, our goal is to always accommodate. We should start out trying to find a way to accommodate. And only come back with a reason to not accommodate if it truly is you know a hardship, as the regulation requires. I hope that helps, Tracie.

>> TRACIE DeFREITAS: That does help very much. You know, one our thought that I had is if you have a situation where an end date is provided and that's approaching but the accommodation is still needed, what kind of advice would you give in that situation?

>> TERI WEBER: Yeah I think we need to be mindful and flexible. So find -- I love that first slide where the flexibility to me is really key. You know, I think the accommodation -- one of the challenges that I feel is when we offer an accommodation, a lot of times it feels to the employee and to the manager that that's it. That's the accommodation and that's what we need to live with for the duration. And it's really not that way.

It should really be viewed as just an evolving process, that idea of cooperative dialogue, Interactive Process, all of those terms really mean let's keep coming back to the table and finding a solution.

You know, I always try to tell my clients, as well, you don't need to give the accommodation the employee is asking for.

You need to give something that allows them to return to work without taking away those essential functions. So maybe there's three or four different potential accommodations. Talk through those. See what's going to work.

You know, I know with COVID and as folks are returning to the office, I'm sure there's going to be a lot of dialogue around who can come back when. I know we'll talk about that in a little bit. But that's a good example of something where you might start something on a trial basis. Maybe people have anxiety about returning to the office. Start them off one day a week. Build it up until when they can return at a more solid progression. So I think there's just always an opportunity to get to the table together. And to see if there's other options.

And when Tracie and I were chatting about this presentation and kind of building content, I joked about trying to convey to my clients not every accommodation is a capital A. Accommodations under the ADA to me are like capital A's you need to really be focused and really paying attention. Following the rules, making sure you have it all documented. But just because you have to do all of that with accommodations with a capital A, it doesn't mean that you shouldn't just be an accommodating employer. And to me those are accommodations with a lower case A. So I think we always want to be accommodating. We just have to be mindful that accommodations with a capital A that fall under ADA obviously have a lot more rigor to them and for those we have to always have a seat at the table to find a reasonable accommodation.

>> TRACIE DeFREITAS: Thanks a lot of good advice for everyone. And I think it reminds us all that flexibility is key. That there could be a variety of solutions that could be implemented depending on the situation. So it might not always be the one that was provided initially. Maybe there was a change that's needed. And that continues to be a collaborative effort between the employer and the employee.

But to also pay attention to the capital A there. And I love that thought about really staying focused on -- is this a situation where we're making modifications for everyone. And we're paying attention to that. But are we also paying attention to what we need to do in terms of what the ADA may require.

So lots of real good advice there.

Thank you, Teri.

Okay. So that moves us into another lesson learned around what we call job restructuring. So when we're talking about temporary changes and modifications and a lot of employers have made modifications in response to the pandemic situation that could have included removing essential job functions now generally this isn't something employers would ordinarily do but they might have had reason to do it under the circumstances just doing the best that they could to keep people working and to keep people safe.

And so some of those changes might have happened.

We know that employers aren't required to change or remove essential job functions as a form of reasonable accommodation under the Federal ADA. But they may choose to do so. So where it's not something that's required, it's something that can certainly be done.

When an employer temporarily excuses the requirement to perform an essential junction, this doesn't mean that the employer permanently changed a job's essential functions or can't reinstate the requirements to perform the essential functions later on.

So for those situations where maybe those functions were taken away as a way to keep somebody working, an employer can still come back to that. And this is coming up I would say because employers are starting to return individuals to the work environment.

And now people are still asking for requests like telework for example. Where maybe some essential functions might have been removed for a period of time. But now they are reinstituting ordinary business operations. And so individuals are being expected or workers are being expected to come back and perform those essential job duties. So you have to like Teri said be thoughtful. Be flexible. Take a look at what's happening in the accommodations situation to figure out, is this a case where those functions were removed and now is it expected that the individual perform them? And if that's the case, is there an accommodation that will enable the individual to perform the essential duties. So making the choice to remove the functions doesn't permanently change the job. It is possible to reinstate those functions. If you really want to take a look -- you really want to take a look at the individual case-by-case situation to figure out what needs to be done. Of course at an employer's discretion employee's accommodations can be looked at like an essential function but this can be reinstituted once normal business operations resume. The EEOC does have some information related to the idea of not permanently changing the job if you have removed those functions in the context of COVID. They use the example of telework. So do look at what You Should Know About COVID Technical Resource for some more guidance on that. Of course JAN also offers some resources related to temporary trial accommodations and going above and beyond and those are some things to think about too. Teri is there anything you want to add about temporarily excusing functions and job restructuring?

>> TERI WEBER: Yeah, I would love to. This is probably one of the areas I get asked the most questions about. Mostly because our job descriptions are never what we would really like them to be. I think I speak for most if not all employers saying that.

And so even before COVID, it was often hard to know with specificity if the accommodation was removing an essential function because what is an essential function in terms of an individual employer, an individual job category, what if it's not on a job description that an employee can reference?

And then during COVID, peoples' jobs changed. You know, I'll take myself as an example. A year ago, I would have been on an airplane two or three times a week, now I -- if you would have asked my employer prior to March of 2020 was travel an essential function of mine, yes, it certainly was. But right now or at least over the past year, it has not been.

So I think we're going to really need to hit the pause here and create a little bit of work for our HR companions to say, how have essential functions changed? And will essential functions go back to what they were prior to the COVID pandemic? Or will jobs evolve? So take me as an example.

Let's say I need an accommodation that says no travel. Well, ordinarily would say well that's removing an essential function and we can't handle that. My response to that might be, well, I've been doing that job for the last year. So is that still an essential function for me? I've been performing, been performing well.

So I think we are going to need to take a hard look. Again, not that the regulations have changed, not that anything has changed related to the ADA per se. But I think as businesses how we've been operating has evolved. So I think this idea of job restructuring is going to really be important for us to not only look at what the essential functions were in the past and making sure those are documented but what are they as we return back to normal? Another example is just being in the office. So many of us in the past would have said coming to the office is essential. Some of that is was just preference that managers or companies had. It's going to be a little bit harder to say that's an essential function if someone has been doing their job a whole year from home. With good success.

So I think we're really going to need to rethink what the essential functions are. I'm not suggesting anyone tackle it tomorrow. Because I don't know that we know you know what the next phase is going to be. But I certainly think it's something we're going to need to put on our priority list.

So thanks for letting me mention that, Tracie.

>> TRACIE DeFREITAS: Absolutely. And I think you make excellent points about the fact that everything is still evolving. And we really just don't know where we're going to be in the next few months. But it is true that the work that most people do has changed in some way because of the current situation. So what does that work look like moving into the future? And also then what does it look like for those people who might need modifications. Or maybe requested modifications in the past that didn't seem to make sense or weren't reasonable previously. So it's a continuously evolving situation.

So let's keep our eyes on it and see where things go.

Okay. So just to sort of recap some of the lessons and think about some tips to pay attention to, we've learned a lot of lessons related to COVID-19, the ADA and engaging in the Interactive Process and in recognizing these lessons it can be useful to pay attention to what we call the five W's and the H. So we want to five out what's being requested. Is it an ADA accommodation? You know with that capital A. Why is it being requested? Is it for maybe a medical reason of some kind? Who is requesting the accommodation? Is it for the employee's own medical reason? Or are they asking for a reason related to someone else? And where is it needed? So at home or at work? So how does it impact the essential job duties? How long will it affect the individual? What factors will impact the end of the accommodation? So this is really about will the accommodation solve the issue of performing the essential duties of the job and meeting the standards during this pandemic situation.

So these are just some things to pay attention to and keep in mind when you're engaging in the Interactive Process. Whether it's related to COVID-19 or any other accommodation situation.

So these are some points to really kind of consider as you go through that process.

>> TERI WEBER: And I love the simplicity -- sorry; Tracie I was just going to say I love the simplicity of that slide.

>> TRACIE DeFREITAS: It's okay.

>> TERI WEBER: Because it just kind of brings us back to basics, that who, what, why, where, when. And I think it's this balance, right, of being equitable but also not necessarily equal.

And I think breaking it down into these 5 W's and the H helps to realize that. Unless you had two exact same situations in the exact same job with the exact same illness with the exact same need, they are not necessarily going to get the exact same accommodation.

You need to be looking at each one individually. And I think breaking it down with these questions really helps to remind us of that. It's one thing to say it. But in practice, sometimes with the difficult cases, you can almost sit down with this list of questions and be writing it down. Saying, you know, what accommodations could I suggest and how it works? My mom used to joke with me and my sister when we were little, I don't treat you equally, I treat you fairly. And in a way that's what we need to think about here. We need to -- not to say we want to treat people different but we want to treat each accommodation based on what it needs so I really like how back to basics this is to help guide people.

>> TRACIE DeFREITAS: Yeah, absolutely. I agree. And I think your mom's lesson is a good one, too. It is about treating people fairly. So that's an important thing to remember with all of this.

And we know that most employers are doing the best they can to make workplace modifications during what is a challenging time. So hopefully this can get people back to those basics. We also suggest when it's easy enough to accommodate through a practical standpoint, if it makes sense, do it. We're all trying to keep people working. And do what we need to do to keep businesses operating.

With this in mind, we're going to go ahead and shift a little bit to talking about lessons learned related to some select accommodation issues.

So we talked a little bit here about sort of the process of engaging in the Interactive Process. But now we would like to just jump into some issues around just accommodation topics in general.

Given the pandemic's circumstances and the pivot that many workplaces have had to make from the traditional work environment, understanding where the job related barrier exists is not an odd concept. When the accommodation process begins, we want to learn where the accommodation is needed and how the accommodation will solve a work-related barrier how it will enable the performance of essential job duties. And in the context of COVID-19, this might mean enabling the individual to work safely and/or perform duties in a different way. In response to the pandemic situation. So we're going to take a look at some of the accommodation issues that have come up. Teri and I can tell you we probably both agree on this that a lot of the sort of common COVID-related adjustments or changes that have come up have been related to telework, equipment for telework. Job restructuring issues like removing job functions, essential job functions, like we've mentioned. Providing Personal Protective Equipment. Policy modifications surrounding issues about wearing masks or face coverings in the work environment. Getting vaccinations. Schedule modifications where maybe there's a reduction in hours or a change in the hours that people are working. And then of course leave has come up, as well.

So of course not a comprehensive list of accommodations but these are some of the more common issues that have come up over the past year.

Now, this brings us to businesses really starting to focus on returning in place to the workplace. But of course the pandemic situation hasn't ended. And this means that employers are receiving accommodation requests to enable workers to either safely return to the work environment, to work at home still, or to access leave. Generally employers are seeking strategies that limit the risk of exposure to COVID-19 in the workplace. So we're still looking at that. Because as people are more out and about and they are coming into the work environment, this is still something that is of critical importance. And so a lot of accommodation requests are around that.

Of course work environments, types of jobs and risks of exposure, they vary greatly.

So the lesson is that returning employees to the workplace isn't a one-size-fits-all accommodation situation.

So I think Teri mentioned this earlier, too, this idea that not all accommodation situations are going to be the same. So we can't take a one-size-fits-all approach to addressing accommodations situations.

Some employees with disabilities or medical conditions might require different strategies for returning to work safely.

And so we have to keep that in mind.

Others still might not be able to return to work at all.

So the lesson is to really address each return-to-work accommodation situation on a case-by-case basis. Don't put all return-to-work accommodation requests in the same bucket and assume each worker with a medical condition or disability will benefit from the same accommodations. You really have to take a look at the facts of each situation. Of course JAN offers several resources with regard to returning to workplace and accommodations you can see our COVID-related page is he askJAN.org website that's askJAN.org and that's right off the homepage. Teri, we talked a bit about returning to work. What are your thoughts on returning to work and ADA accommodations?

>> TERI WEBER: Yeah, I mean, I think everything you said was wonderful. And echoed by me. I guess the only thing I would add that's kind of been interesting is as more states start passing regulation, employers just need to consider how their ADA return to work process fits with that some may be different with return to work so you want to make sure state mandates don't limit you with your current process I know Massachusetts has some language that can be viewed as making employees be more gentle in terms of return to work and less aggressive so just a little footnote there.

But I think everything you said returning after COVID is valid. And I think we'll still have quite a long time of return-to-work strategy relating to COVID.

I also think as we talk a bit about vaccines and I know that that's coming up as kind of you know a major topic and something we have a slide on later. But that's going to be a main component of return to work, too.

So a little teaser for a few slides from now.

(Chuckles).

>> TRACIE DeFREITAS: Absolutely. I think, too, and this will lead us, too, into the next slide but we're seeing a lot of states that are now dropping their mask mandates. How does that play into these return-to-work situations? What sorts of questions are we going to start getting related to those kinds of issues? And people not wearing masks or not being required to wear masks, things like that. So it's complicated. Absolutely.

Which leads us to the next issue which is related to masks and face coverings with regards to the work environment of course Teri and I have discussed different things on this topic based on the different industries and locales of the employees we serve we believe these lessons may evolve as perspectives change of course about mid pandemic JAN started receiving a lot of questions relating to employees saying they couldn't wear a mask. Some couldn't for medical reasons. Others simply didn't want to and we know that masks can be mandated in the workplace so accommodations can be made for people who can't wear one. You have to keep that in mind. It means reasonable and effective when it's to stop the spread of pandemic of course barring an undue hardship or a direct threat so under the ADA an employer may request medical information about why someone can't wear a mask when a medical reason is presented and the impairment and the need for accommodation is not known. So I think that's the question we started getting, they say they can't do it. How do we know there's a medical reason why they can't? What we can do is tell people we know the ADA requires the employer they can ask for more information so they can establish that in fact this is an ADA issue. That there is some sort of issue to provide accommodation under that law. You don't just have to take the individual's word for it necessarily.

Now, of course some state mandates can impact the Interactive Process like Teri mentioned which can include restricting requests for medical information. So while we know this would apply in many instances related to public accommodations and face coverings, we have been made aware of this type of restriction applying to employers in some states. And this was based on mask mandates that were implemented.

How does that change now that many states are dropping those mandates? I'm assuming it's a non-issue with reference to the statesman date.

But I think that's going to be an evolving issue.

Teri, what are your thoughts on the evolution of mask-related accommodation issues as workers return to the workplace. And these mask mandates are lifted?

>> TERI WEBER: Yeah, I think the volume is just going to continue. You know, I think for employers that have remained operational without too much of a change, they have probably been seeing the mask mandates and challenges and accommodations related to them stay pretty steady but I think there's been a lot of employers that haven't been dealing with this as much because most of their workplace or at least a portion of their workplace is at home. So I think as we start coming back into the office, we're going to start seeing a rise of these returns.

And I do think it's going to be interesting what happens. Because unfortunately and a little less so over the last few months. But masks became a little bit of a political statement for some. And in some areas of the country.

So I think it will be interesting to see how it plays out. But hopefully as the vaccine comes in, we'll be able to see the mask mandates shift a bit. But I think similar to a lot of other policies that we see in HR, workplace drug policies, et cetera, you're going to need to make a decision for your company of what you want to do.

Then you're still going to have these exceptions and these accommodations like Tracie is talking about so I kind of see it increasing over the next few months. But hopefully this time next year, we won't be talking about it. But I guess time will tell.

>> TRACIE DeFREITAS: We will see for sure.

Okay. We have about eight minutes left to cover the rest of our content. So we're going to keep moving on to the next lesson, which is related to telework.

Of course this is a flexible work arrangement of the year I would say. Historically employers have been leery about allowing telework as an ADA accommodation. But now it's kind of saved the workday for a lot of businesses that had to shift operations due to COVID I think the big question now if an employee has been teleworking and now the employee is returning in place to the workplace must telework still be allowed as an accommodation for an employee with a disability or medical condition who requests it for a reason related to COVID. And maybe. What we know is that while telework is not automatically required as an ADA accommodation, when employees are recalled to the workplace it still may be necessary to have that discussion and figure out if it's still something that could be provided as an accommodation so what's important there is to engage in that Interactive Process to figure out whether or not it's needed for a disability-related reason and if it's something still reasonable. Can the essential functions be performed in a telework capacity so the employer can determine whether or not that is something that's a viable option as an accommodation.

Teri, any thoughts on how telework required or allowed during the pandemic might impact the future of remote work as an accommodation?

>> TERI WEBER: Yeah, I mean I just think that because assuming employees have been doing work remotely with a favorable outcome, it's going to be a little bit harder I think for employers to defend a position of coming into the workplace because of a hardship or because it's unreasonable. That's certainly not for every single employee and every single job.

But I think that is going to be just a little bit harder to defend. If you've been successfully with the last year with -- successful for the last year with 90% of your workforce remote. I also think this is something that's not going to go away right away. There's going to be policies around vaccines, et cetera, and those will definitely implement -- sorry; not implement. They will impact what companies do related to telework. But I just think those definitions around reasonable and hardship are definitely going to have to take on a slightly different meaning. For folks who maybe have been working remote for a whole year.

>> TRACIE DeFREITAS: Absolutely. You know, I think that we can see if the individuals have been able to work effectively, assuming that they have been able to perform all of the essential duties at home, it's going to be harder to make the case for it not being something that's reasonable. So that trial period might be something that could serve to prove that it might be an effective means of accommodating somebody.

I think it's something we're really going to be paying attention to moving into the future.

All right. So let's move to the next topic of leave.

This is a tricky one. If accommodations can't sufficiently limit the risk of exposure to COVID-19 in the workplace and if working at home is not a reasonable solution, leave is something that can be looked at under applicable Federal state and local requirements as well as employer leave policies.

Of course the COVID-19 pandemic presents challenges in providing leave as an accommodation under the ADA. But it is something that can be explored. It hasn't been directly addressed by EEOC with respect to issues arising from the COVID-19 pandemic. Particularly as it relates to indefinite leave. So that's something trickier. We know that indefinite leave is generally not considered a reasonable accommodation under the ADA. In the context of leave, the ADA and COVID-19, it is up to the employer to decide what is reasonable. And when the request is for what might be an indefinite duration of time.

Of course EEOC says that something is not an indefinite leave request when someone can provide an approximate date of return or provides a time period in which the employee can return to work. So you want to pay attention to that.

But the lesson probably here is to apply internal leave policies and applicable Federal and state leave laws before taking the ADA path. If ADA is the path, then request an anticipated duration for the need for leave as a starting point. It's possible to consider incremental approval so back to that end date concept or the temporary accommodation concept. And then you can revisit the situation and assess for undue hardship as time goes by.

Of course an employer may choose to provide indefinite leave as an accommodation but I think that's a sticky spot to be in. So I think you want to be careful with that. But ultimately look at other avenues for granting leave before using ADA as the path is what I would say.

Of course Teri, the complexities of leave are -- just go on and on and we could talk about that for days. Any insight on this lesson?

Are you still with me, Teri?

>> TERI WEBER: Sorry; I forgot to hit the mute button I was having a really great conversation with myself over here.

I mean, no, thank you for giving me the opportunity to talk on leave but you're right we could spend days and days on it. I think the biggest thing here like you were saying is I find it best practice to only introduce ADA when other leaves have been exhausted or reviewed. Running ADA concurrent with other job-protected leaves I think just makes a lot more work for the employer. Even though technically ADA might be running behind the scenes. But the other thing I would add just for discussion is employers can always be more generous. But just be careful with calling it ADA or for that matter calling it anything that has a lot of definitions attached to it. You know, FMLA, et cetera.

Only call it ADA leave or an ADA accommodation for leave when that's truly what it is. Otherwise to your point a few minutes ago, it's a little bit of a slippery slope.

But yeah, I think you did a great job taking a really complex topic of leave and boiling it down. So great job.

>> TRACIE DeFREITAS: I think unfortunately it will continue to become more complex as additional states add paid leave laws and address COVID-related leave. And as we see an extension of FFCRA. So it just does get a little bit tricky so I think taking the practical approach here and looking at all other options first does make sense.

All right. Let's get to our last lesson learned for today. We're going to wrap up today with a trending topic the impact of COVID-19 vaccination on providing accommodations. You know the availability of COVID-19 vaccines it's really led to questions about the ongoing responsibility to continue to provide reasonable accommodations related to the pandemic.

And employers are wondering if they can ask questions about vaccination. And if accommodation is still needed for those people who have received accommodations.

An individual's circumstances where an -- in individual circumstances where an employer is trying to determine if an employee still requires an accommodation an employer can go about asking questions about the impact of the vaccine on mitigating risk factors on related to exposure to COVID-19 this seems to be a valid question in determining whether the vaccine will impact the continuing need for accommodation. You want to keep an open mind about it of course. The mere availability of a vaccine doesn't necessarily take away the responsibility to provide effective and reasonable accommodations. When there's still a work-related barrier related to a medical condition. So keep that in mind. Of course as we have said repeatedly, you want to look at each situation case by case. A medical condition might prevent someone from being vaccinated. And also some workers with medical conditions, even after being vaccinated might still need more protection from exposure to the virus than others.

So while COVID-19 vaccine can certainly protect people from becoming severely ill, being vaccinated doesn't 100% guarantee that someone will not contract COVID-19.

While we know that employers have the authority to mandate that employees receive a vaccination, if all employees are not required to receive that kind of vaccination, then you also want to make sure you're not requiring employees just with disabilities to be vaccinated as a way to stop providing a reasonable accommodation. So it's not an alternative to providing reasonable accommodations. So keep in mind that would constitute disparate treatment of employees with disabilities. One final lesson there is to keep in mind that avoiding to make that decision, any decision, based on COVID fatigue. I'm sure you've heard this term used in various ways. Here we're talking about being careful not to make accommodation decisions for example stopping an accommodation simply because the employer doesn't want to provide accommodations related to COVID anymore. We have heard about situations where employers have just said, we're not going to do it anymore.

So you really want to keep that in mind.

Teri we have about 30 seconds and I'll extend the last word to you on any accommodations, lessons, that we have talked about here. Or if you want to comment on the vaccine-related issue.

>> TERI WEBER: Yeah, I think you did a great job covering the vaccine-related issues. So I guess I would just really remind folks in closing and I'm sure Tracie will have some closing words, too, is the ADA really hasn't changed because of COVID. But I think our reaction to the ADA and our reaction to everything quite frankly has just evolved. So stay true to your process of reviewing each individual leave, having that Interactive Process. Those 5 W's and the H. If we can stay true to that I think we will all still remain in compliance. We just have to be careful of making those quick decisions because of COVID or because of the high volume. We need to stay true to the regulation and our roots and everyone will hopefully be fine if we can follow those simple -- although they are not that simple when you're in the weeds. But you know those simple questions to ask yourself can help us all remain compliant so thanks.

>> TRACIE DeFREITAS: Absolutely. I think that's a great place to close for today. Teri I thank you so much for collaborating with me on this webcast. It's been great fun. And I think that our listeners have learned a lot today. I want to also thank Alternative Communication Services for providing the net captioning today.

At the end of the PowerPoint you will find a great deal of resources related to COVID-19, the ADA, accommodations, so please make sure you take a look at all of those resources. If you have any questions contact JAN at JAN@askJAN.org it's a quick way to email us or jump on our website at askJAN.org if you need additional information we will be happy to help you with that we'll take a look at the questions submitted and follow up with some information we can send out to everyone who attended today. Thank you, everyone, for attending. Please do take a moment to stay online and fill out the evaluation form. We appreciate your feedback. So we hope you'll take a minute to do that. Again, thanks for attending today.