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**JAN**

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 >> LISA MATHESS: Hello everyone and welcome to the Job Accommodation Network's Accommodation and Compliance Audio and Web Training Series. I'm Lisa Mathess and I will be presenting today's program along with Matthew McCord. The program is called "Return to Work (RTW) and Stay at Work (SAW) Programs".

 But before we start the program, I want to go over a few housekeeping items.

 First, if any of you experience technical difficulties during this webcast, please call us at 1-800-526-7234 for voice and hit button 5 or for TTY call 877-871-9403. Or you can log on to the live chat feature on askJAN.org.

 Second, we plan to answer as many questions as we can during the presentation. So please send in your questions at any time during the webcast to our email account, question@askJAN.org. Or you can use our question and answer pod located at the bottom of your screen.

 To use the pod just type in your question and then hit submit to the question queue. Also on the bottom of your screen you'll notice a FileShare pod that you can use if you have difficulty viewing the slides or would like to download them. And finally, I want to remind you that at the end of our webcast is an evaluation form that 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.

 Now, let's start today's program.

 Just to give you all an idea of the topics we'll be covering today, first we're going to go over stay-at-work and return-to-work programs and how these programs can overlap with the Americans With Disabilities Act or the ADA and other laws. Then we're going to spend some time looking at best practices that employers have developed or thinking about developing stay-at-work and return-to-work programs might want to consider. Once we have wrapped up the content piece of the webcast Matt and I will go through some situations that JAN consultants have assisted with regard to stay-at-work and return-to-work programs and then of course we will leave time at the end of this program for questions you may have for us.

 At JAN we specialize in Title I of the ADA or the provisions we wanted to include a little shoutout that the ADA celebrates its 30th anniversary this July. July 26th, 2020 it will be officially 30 years since the Americans With Disabilities Act with a signed into law by George W. Bush. So let's start by looking at the purpose of stay-at-work and return-to-work programs one of the more important takeaways of our presentation today is early intervention through participation in these programs can be key in preventing a long-term or permanent disability. In many cases an employee has not been completely restricted from working but remains on leave for extended periods of time unnecessarily.

 Stay-at-work and return-to-work programs can take away the need for an employee to remain on leave during what is a relatively short window of time in which an injury or illness can transition into a longer term issue. Research suggests that the likelihood of an injured worker returning to the workplace drops by 50% by the 12th week of leave and when an employee remains on leave when they could actually be we are forming some type of work the negative impact can extend from the individual to the employer and beyond.

 Another benefit of stay-at-work/return-to-work programs is keeping those experienced trained employees on the job often cost less than hiring and onboarding new hires according to an ongoing JAN study for the employers who contacted JAN for information those trying to retain or promote a current employee. Returning these employees through stay-at-work and return-to-work with little or no accommodations can be done with no expense JAN has shown consistently over the years that accommodations average a one time cost of $500 another purpose of stay-at-work and return-to-work programs is that an employer -- for an employer to remain in compliance with disability related legislation such as the ADA.

 JAN has developed a publication dedicated to return-to-work programs that we wanted to highlight. A link to that document is here on this slide for future reference.

 So what do the numbers say about work related injuries and lost work days according to the Bureau of Labor Statistics in 2018 there were almost 3 million non-fatal work related reported injuries over half of these cases were serious nature that had days away from work job transfer or restriction almost 1 million caused employees to miss at least one day of work in 2018. The median number of missed work days due to occupational injuries and illnesses was also eight. According to the ongoing JAN study that looks at the cost of accommodations in relation to the benefits employers receive from making workplace accommodations, 85% of employers surveyed contacted JAN looking for accommodation information. To retain that current employee. These statistics really relate how our service at JAN can facilitate the process of keeping an employee on the job with accommodation or getting an employee back to work with accommodation both of which help ensure the compliance with the ADA and stay-at-work and return-to-work programs.

 The main goal of stay-at-work is to keep an employee on a job despite having an injury or temporary impairment. For some employees a medical condition injury or temporary impairment doesn't necessitate time away from the work site. If there are accommodations that could be made for the employee to stay at work. With stay-at-work there may or may not be any days taken for leave and stay-at-work programs can implement prevention strategies such as ergonomic assessment to help mitigate the chance of future injuries in the workplace some tips for working through the process to keep an employee on the job include involving the physician throughout the process to ensure that decisions are being made that are appropriate for both the employer and the employee. The employee should also be kept informed during the process so expectations and plan of action are clearly understood. There may be incentives for employers or managers to engage in a stay-at-work initiative that's been set by the company or Workers' Compensation Board. And of course, when accommodations would enable an employee to remain at work need to be explored, JAN can be an excellent resource for everybody involved.

 There can be numerous benefits to having a stay-at-work program for both employer and employee but we wanted to highlight just a couple today.

 Stay-at-work programs can often reduce the number of lost work days taken after an employee sustains an injury or acquires an illness or disability on or off the job. As mentioned before the median number of lost work days is eight and certainly if accommodations could be put into place for an employee who might have otherwise been out of work for a week or so, the number of reportable lost work days could be decreased. Stay-at-work programs can help maintain workforce productivity from a practical perspective if you have even one employee off for a day there can be an impact on productivity. When we start to extend the number of lost work days for an employee, the impact on productivity can start to become substantial or they develop the need to get temporary employees which draws up the costs. Stay-at-work programs can help to lower the risk of a condition becoming a long-term or permanent disability. The general standard is once an employee has been out of work for six months, the chance of them returning to full employment is about 50/50. Being and remaining on leave of absence can have a major impact on a person's well-being and how they view themselves. Stay-at-work and return-to-work programs have the potential to bring people back to work from a leave of absence before conditions can turn into a long-term or permanent disability.

 Naturally keeping an employee on the job through a stay-at-work program and with accommodations can help reduce workers compensation costs incurred by the company. And like I mentioned before, those that are worried that accommodations equal cost, 58% of accommodations cost nothing while 37% reported that one-time cost of $500.

 Here on Slide 8 we wanted to offer a basic comparison of the ADA Amendments Act and workers compensation since they can both come into play and overlap when an employee is doing a stay-at-work or return-to-work program so under the ADA Amendments Act an employee can be covered even if the injury isn't work related as long as the individual meets the definition of the disability and the ADA Amendments Act they are entitled to accommodation. Different from workers' comp which covers work related injuries and determines eligibility based on however state workers' comp specify under the ADA Amendments Act we look at restrictions, limitations and job tasks when determining an accommodation. Under workers' comp the employee will at some point be classified under a certain disability status such as totally disabled, totally disabled or having reached maximal medical improvement or permanent disability. The ADA Amendments Act does not have to be -- have a permanent disability and not required to create -- probably one of the many questions we get with the Amendments Act overlapping with workers compensation has to be with light duty. We'll be getting more into depth about this later on but just to touch on this right now ADA doesn't require to create light duty work. EEOC has a guidance which we have offered a link on this slide if you want to better understand what is required of an employer when both laws need to be taken into consideration.

 Are the ADA and workers compensation laws the only laws employers need to consider when engaging in a return-to-work or stay-at-work process of course not there are many laws that come into play many state and localities have anti-discrimination laws similar to ADA and agencies responsible for enforcing those laws states civil rights or human rights laws differ from state to state and it's important to be compliance with these laws in addition to ADA and workers compensation. Some states have disability benefits programs that apply to employees. Again these differ around the country but are important to be aware of during the Interactive Process. There's also labor laws that can also differ from the ADA and workers compensation. At both the Federal and state level.

 Of course if an employee needs to take leave and is eligible the Family and Medical Leave Act or FMLA could come into play and from an employee's perspective short-term disability long-term disability or Social Security Disability Insurance programs may also be a part of this picture.

 >> MATTHEW McCORD: On January 1st, 2009 the ADA Amendments Act of 2008 went into effect making some major changes to the way the definition of disability has been interpreted in the past. In the past, temporary conditions might not have been considered substantially limiting as neither the ADA nor its regulations indicated whether temptry impairments are covered or excluded.

 However, at least one Commissioner at the EEOC says that the duration of an impairment is not that important anymore. She gives the example of a broken leg and states that although it does not last very long it can be substantially limiting until it mends so to be on the safe side employers might want to err on the side of caution and consider that short-term impairments such as broken legs might be covered by the ADA.

 Moving along to return-to-work, employees who have been on leave may need -- may need accommodations in order to return to work. Whether that leave was provided under FMLA, short or long-term disability, leave as an ADA accommodation or workers compensation.

 The goal of return-to-work is to get an employee back on the job as soon as medically feasible this may be returning to their own job with accommodations or to a new job, depending upon the situation.

 When an employee has been released to return to work, an employer is able to ask for a limited amount of medical documentation to help them understand what the employee is able to do. And to make appropriate decisions regarding accommodations.

 We always stress that the employee should be involved throughout the process. As they are often in the best position to provide clarification on what their medical needs allows them to do.

 It is important to point out that employer policies, which require employees to be completely restriction free before they may return to work may violate the ADA.

 The reason behind this is that even if an employee has restrictions, they may be able to return to work with or even without an accommodation.

 For example, an employee who has been on leave following a back injury may be released to return to work with a 25 pound lifting restriction. If the employee's job doesn't require them to lift anything over 25 pounds, then they should be allowed to return to their job. Or if the employee would need to lift over 25 pounds as part of their work, an accommodation like a compact lifting device, could be provided to enable them to do that lifting despite the lifting limitation.

 Having a policy in place saying that employees have to be 100% restriction free can create problems for an employer. So these policies should modified to ensure that employers are in compliance with disability related legislation.

 Now that we have a basic idea of return-to-work programs we just wanted to again review the benefits to having them. Over 80% of the inquiries at JAN are regarding retaining a current employee. That shows that we want to keep the employees that are already with the company working. And that they are valuable assets to the organization. Return-to-work programs increase productivity by enabling employees to resume work earlier while they are recuperating they are able to protect their income and boost the company's output at the same time. Return-to-work programs may also reduce the cost associated with recruiting onboarding and training new employees afterall you don't have to pay all of that when you retain an employee who already knows what's expected of them.

 Research shows that return-to-work programs help reduce workers compensation costs and they also reduce costs by minimizing the impact of an employee's disability including the loss time and the disability benefits.

 It was mentioned earlier that when an employee has been released to return to work, an employer is able to ask for a limited amount of medical documentation to help them understand what the employee is able to do. And to help them make appropriate decisions regarding possible accommodations. Sometimes the disability and accommodation are obvious. So no medical information would need to be gathered.

 In other situations the employer may need documentation of the disability and what's truly needed as an accommodation.

 We want to remember the ADA's definition of disability and with the ADA Amendments Act it's a very broad definition that now includes bodily functions along with the original major life activities. To provide effective accommodations employers need to know what limitations are interfering with job performance and what specific work tasks are an issue.

 As for ADA confidentiality rules, information from all medical examinations and inquiries must be kept apart from general personnel files as a separate confidential medical record available only under limited conditions specified in the ADA.

 When talking about returning employees to work while they have restrictions, the topic of direct threat will often pop up in our calls. An employer may require as a qualification standard that an individual not pose a direct threat to the health or safety of themselves or others.

 Employers can have fears that employees returning to work might pose a safety risk. We see this fear come up in our calls as well as the concern that despite what the medical documentation says, the employee may not be ready to come back. It may also be that the employer is not concerned about the employee returning to the workplace per se but is worried about their ability to safely perform the job due to the knowledge that they have of the medical condition. While these concerns may be understandable not every concern will rise to the level of a direct threat which is a fairly high standard to meet. And needs to be evaluated carefully.

 This slide breaks down what factors help determine whether or not an employee with a disability is posing a direct threat to the health and safety of themselves and others.

 First, an employer cannot deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The employer must be prepared to show that there is a significant risk of substantial harm in the event if the person were to return to work.

 The risk needs to be identifiable. We can't assume that everyone with this particular disability will pose a threat to the workplace. Simply because they have that condition.

 It must be a current risk, not one that's speculative or remote. So we also cannot assume that a specific medical condition will get worse and, therefore, they pose a direct threat.

 In determining a direct threat to health and safety, the determination of a direct threat to health and safety must be based on a reasonable current medical judgment and/or the best objective evidence available. This is why we value employee input and medical documentation. But even if a genuine direct threat exists, the employer must consider whether the risk of harm can be eliminated or reduced by reasonable accommodation.

 If there is concern about returning to the work environment or performing the tasks of the job, you might talk about potential accommodation ideas that could help. And JAN is always available as a resource to try and help you brainstorm ideas.

 Now that we have learned what a return-to-work program entails and how they can be beneficial here are some administrative DOS and don'ts to help employers develop one of their own as for dos first consider transitional employment plans which includes modified duties accommodations to help individuals perform their duties or an alternative work assignment to enable workers to transition back to work following an injury or illness.

 Next, consider implementing a light duty program. Which generally refers to temporary or permanent work that is physically or mentally less demanding than their normal job duties. It can also be helpful to train on ergonomic techniques. Ergonomics can help prevent injuries and limit secondary injuries this can involve training on proper lifting techniques, proper postures, emphasizing task variation and workstation setups.

 Finally, consider temporary accommodations. Employers may want to try and make temporary accommodations even beyond the ADA's minimum requirements because you want to show a good faith effort. And it keeps employees working. Which is what we all want. As far as administrative don'ts, first and foremost, don't maintain 100% healed policies. As we discussed, these can be a violation of the ADA as they can be a blanket exclusion.

 There are going to be many instances that a person could perform the essential functions of a job even with restrictions. So we want to be mindful and engage in a process to see what a person truly does or doesn't need in order to return to work.

 Relating to the idea of not maintaining restrictions in policies don't make assumptions, we don't want to assume every person with a about a impairment has a 20 pound lifting restriction. Again it's going to be case by case and need a true analysis.

 >> LISA MATHESS: Now we're going to spend some time reviewing best practices for employers and service providers to consider when working with employees who are covered under the ADA and participating if the stay-at-work or return-to-work program.

 To get us started let's review how the job description plays a role in stay-at-work and return-to-work processes. According to the EEOC, ADA doesn't require an employer to develop or maintain job descriptions. But developing and maintaining job descriptions could be a good business practice for a number of reasons.

 A written job description can help employers attract qualified and interested candidates to fill vacancies. And employers are free to change the content, nature and functions of a job. And when this is done, a clearly written and up-to-date job description can help current employees better understand the responsibilities of the job being performed.

 Job descriptions can standardize the functions of a particular job across multiple locations. And they serve as a way to document what functions of a job are considered essential and what functions are marginal. Job descriptions should be kept up to date so they accurately reflect what the job actually entails. In some cases a job analysis might be needed to ensure that job tasks learning disability on the description are actually required of the job. A job analysis is an investigative process that involves observing an individual who is actually doing a job, observing co-workers, interviewing the worker and interviewing co-workers. A job analysis essentially involves determining the job's purpose and structure of the job setting including specifics about work sites, clarification and activities. JAN offers an compliance series on job descriptions if you're interested in learning more about formulating a job description, you can see the link on this slide.

 Looking at an example, a foodservice manager with a back issue was trying to get back to work following back surgery. Before the medical provider could weigh in on the employee's functional limitations it was helpful to provide a doctor with an updated job description which had their job requirements and working environment so with this better understanding of what the job truly entailed the doctor could provide substantiating information for an accommodation request specifically tailored to the lifting and standing restrictions.

 According to an informal guidance from the EEOC requiring an employee to be 100% restriction free could violate the ADA when applying for a person with a disability. These employees could challenge these types of policies under ADA and even though they don't meet the first two prongs of the ADA they may be show that the employer regarded them as having a disability that the employer didn't let them return to the regular job or based on the 100% healed or restriction freed policy these types of policies can be viewed as blanket exclusions according to the EEOC general blanket exclusions of an entire group of people with certain disabilities could be used to unnecessarily screen out people class wide -- things that are based on fear about future medical or workers compensation costs are unlikely to survive a legal challenge under the ADA. We caution employers against having these 100% healed and restriction free policies. For this reason and because the ADA requires an individualized case-by-case analysis of accommodation requests. Each request should be -- is different and should be addressed through an Interactive Process.

 We have the example of a security guard is ready to return to work and happened to have a 50 pound lifting restriction the employer had 100% restriction free policy. The employee was denied return to work unless they had no restrictions and could lift over 50 pounds. The employee cited an ADA and requested a policy modification showing that they didn't even have to lift 50 pounds on the job and was able to perform the essential functions. And even if it did require lifting an employer should have considered reasonable accommodations.

 Providing temporary accommodations can be yet another best business practice that helps to ensure that employers are complying with the ADA as well as stay-at-work and return-to-work initiatives there's no definite answer to a question on whether an employer is obligated to provide an accommodation on a temporary basis but it's showing a good faith effort is being made to keep the employee working. Temporary accommodations may be needed while the employer is making a more determination or researching accommodation requests or when there's a temporary barrier in the workplace or environment that's having an impact on the employee with a disability.

 In some cases failure to consider or offer an accommodation on a temporary basis could be a violation of the ADA if not granted. In any case when after employer is able to grant an accommodation on a temporary basis the employer should make clear to the employee that the accommodation is in fact temporary.

 The situation we have to present on temporary accommodations is one where we have an employee with a new diagnosis of hypersomnia, a sleep disorder so with that they are now on a new set of medications and struggling to make it to their shift on time. Luckily the employer granted a temporary flex schedule to give her time to adjust to those new medications so that she can come in a little later and perhaps stay a little later to make up the time. She and the employer also looked at options to help her stay alert during the day.

 Here we wanted to provide a link on the JAN resource of providing temporary or trial accommodations. Different reasons you might want to consider temporary accommodations and then also a sample form for documenting that it is temporary in nature.

 The term light duty can mean different things in employment settings. Generally light duty refers to temporary or permanent work that is physically or mentally less demanding than normal job duties. Some employers use the term light duty to mean simply excusing an employee from performing those job functions that they are unable to perform because of an impairment. Light duty is a term we often hear associated with workers compensation. And so we might hear it from an employee participating in stay-at-work or return-to-work programs that's promoted under workers compensation.

 But how does light duty apply under the ADA? Well, under the ADA an employer is not required to create a light duty position for non-occupationally injured employees with a disability. However, an employer must provide other forms of reasonable accommodation required under ADA. For an example an employer could restructure a position by redistributing marginal functions that they can't perform because of the disability. A modified schedule including part-time work or reassignment of a non-occupational injured employee with a disability to an equivalent existing vacant position could be considered hardship in some cases the only effective reasonable accommodation available for a person with a disability may be to reassign them to a vacant light duty position that's been reserved for workers compensation purposes. The reason this would need to be considered is because reassignment to a vacant position and appropriate modification of an employer's policy are forms of accommodation required by the ADA absent undue hardship so now we have a maintenance worker with a ten pound lifting restriction. The employer contacted JAN for light duty roles. JAN provided information on light duty definitions and accommodation solutions for light duty positions. Luckily in this case the employer did have a vacant delivery driver role so they ended up sliding this maintenance worker into that driver role for a short-term solution while the employee recovered.

 Job restructuring is another type of accommodation that may be necessary for an employee who is looking to remain on the job or return from a leave of absence. Job restructuring may be needed when an individual is having difficulty performing some functions of the job and requests that the employer restructure the job as an accommodation. Under the ADA, job restructuring is only something an employer has to consider if the problematic work function is marginal, not essential. Job restructuring can involve either reallocation or elimination of a marginal task or performing functions in a different manner when the employer removes the marginal task they can give the employee with a disability a different marginal task that they are able to perform in exchange for the function that was removed. And job restructuring might also require another type of accommodation in order for it to be an effective solution such as purchasing a piece of equipment to enable an employee to perform an essential function or modifying a schedule.

 To sill strait this we have an example of a teacher with seasonal affective disorder. Lots of fatigue because now it's winter and they were changing their medication.

 The accommodation here was that the employee was willing -- employer was willing to remove marginal tasks during the winter months they weren't required to do early and late bus runs so they can put all of their time and energy into the essential teaching task.

 Transitional work plans which can refer to modified duties or tailored accommodations or even reassignment to another position all of which can minimize the transitional period from partial disability to full duty these plans are often temporary setup and temporarily designed for the work for employee to return to their original job thus enabling them to perform the essential functions with or without accommodations.

 Transitional work arrangements are not necessarily acquired under the ADA but the law doesn't require you to -- the law doesn't require you to create positions but practically speaking you may create positions for task completed anyways to get an injured worker back to work sooner also these arrangements may entail returning an injured worker back to their same position with a renewed schedule or part time again there could be ADA accommodations when changing full time down to part time but for temporary accommodation it could make good business sense in a return-to-work program. These transitional work plans are showing that they can benefit from an employee from the medical standpoint but benefit the employer with increased productivity.

 We have a situation solution example.

 A custodian with a knee injury was able to work but not at full capacity. They asked to return part time and gradually increase their hours back to full time. The employer did agree that a transitional work arrangement that could last four weeks with the expectation that the employee would be able to work full time at the end of those four weeks. So you'll see even though the ADA might not require changing full time to part time, four weeks with this employee that already knows the job is going to be more productive than a new hire needing to be trained on that same job.

 >> MATTHEW McCORD: In the event that an injury or medical emergency does occur in the workplace, it's wise to be prepared. Preparation begins with a plan of action. A plan of action can be helpful as it enables everyone to be on the same page and understand how to access the information they need in the event of an emergency a properly implemented plan of action may reduce the confusion, panic or fear that staff may experience if they witness a medical emergency on the job. Designated people will have their tasks, recognizing an emergency calling an emergency contact or maybe 911 someone to wait with the employee and knowing whether or not to provide aid as that may or may not be necessary from a practical standpoint it may be heavily considering establishing a general plan of action for any medical emergency in the workplace. A specific plan can be helpful if needed for a specific employee, but a general plan might be used if someone were to have an unexpected medical emergency at the work site. We do have a sample plan of action that can be found on our Website. There's a link to this sample at the bottom of this slide if you're interested.

 Under the ADA reassignment to a vacant position can be a reasonable accommodation as long as the employee is qualified for the new position an it does not -- and it doesn't provide an undue hardship for the reassignment for accommodation in turns of the stay-at-work and return-to-work program reassignment may be a temporary accommodation or it may be more of a permanent solution.

 For instance, a temporary reassignment can be useful when the Interactive Process is taking place and you're exploring accommodation options for the original position.

 As far as the ADA goes reassignment is typically an accommodation of last resort but sometimes reassignment can be the best option.

 If the employee and employer are in agreement that reassignment to a vacant role will be the best solution, then they can move forward with that as opposed to exhausting all other options to keep the employee in their current position.

 To give an example, a mail clerk in a corporate office was not able to lift items heavier than 15 pounds. Most packages weighed more than this. And there were only a few other clerks available to reallocate this task to.

 Here the employer reassigned the employee to a filing clerk position that was vacant while another employee was an medical leave. This was a temporary arrangement but it allowed the employee to continue working and eliminated the costs associated with hiring a temporary worker for the filing job.

 Although we try and minimize the amount of leave taken in many instances there are some points we have to be mindful of when it comes to leave as an accommodation. Leave can be provided under FMLA, ADA or workers compensation. It may be necessary to consider many laws and regulations that may offer leave often there's an overlap. So be aware of what the person is eligible for and what the obligations may be under each regulation that they are eligible for protections under leave may be needed for a variety of reasons. Leave could be used for medical appointments, to obtain medical treatment, to recuperate from an illness or surgery, to recover from a flare-up stemming from a chronic medical impairment, et cetera. Leave can be intermittent may -- which may involve the use of unscheduled accrued paid leave or unpaid leave usually in smaller segments rather than all at once.

 ADA leave is job secured meaning that once the employee is ready to return to work, they must be returned to the original job unless it poses an undue hardship if it does pose an undue hardship then reassignment to a vacant position where it would not be one to provide the leave needed may be a good next step to consider.

 The employee cannot be penalized for using approved leave. To penalize someone for missed work during an approved leave could be considered retaliation and this would also make the leave an ineffective accommodation as well. Paid leave should be offered before unpaid leave. The EEOC states an employee with a disability should be permitted to exhaust their paid leave before using unpaid leave as an accommodation. Employers can't force employees to stay on the job if they are FMLA eligible but with ADA leave there's also the option of exploring accommodations that would enable the employee to remain on the job as long as it doesn't interfere with their ability to address their medical needs. Employers cannot force employees to take leave instead of offering accommodations. The whole point of the ADA is often to keep employees working so if there's an effective accommodation that would enable them to perform the job that should be reviewed. Leave can be considered a less effective accommodation if there are options that would allow them to remain working as this would deprive the qualified employee of their ability to work. Also employers cannot force employees to take leave until the Interactive Process is complete. Sometimes employees may request accommodations and the employer reacts by immediately placing them on leave while they figure out what to do. In most situations, an employee should be permitted to continue working during the Interactive Process. Because perhaps with temporary accommodations in place until the process is complete. Placing someone on leave during the Interactive Process may be appropriate in limited situations, though like a genuine direct threat is present and the employer is waiting on medical documentation to help them figure out if they can reduce that risk via accommodation.

 We commonly receive questions about indefinite leave under the ADA an employer may have to grant extended leave when necessitated by a disability but they don't have an obligation to grant indefinite leave this can be frequent unpredictable requests for leave or extensions to a leave. It could also be a leave with no fixed return date. When an employee needs extended leave it may be helpful to clarify the need. If there is no set return date from the start it can be helpful to provide an approximation. Even if it's not exact, it can help determine how much time can be implemented absent undue hardship and also avoid scenarios where the employer may interpret the documentation as asking for indefinite leave.

 We talk a lot about implementing an accommodation absent undue hardship. When it comes to the accommodation of leave, the following are some examples of when the request could pose a hardship on business needs.

 Sometimes the chronic, frequent and unpredictable nature of the absences may put a strain on the employer's operations. It might be the inability to ensure a sufficient number of employees to complete the work required. It might be a failure to meet work goals or service customers and clients. It might be a need to assign work to other employees, making it difficult for those other employees to do their own work or posing significant additional burdens upon them.

 Or it could be incurring unmanageable costs as a result of other employees working overtime or needing to hire temporary staff.

 Here is a scenario where an employee was out on leave for 12 weeks since it was a 12 week leave we can likely assume it was FMLA leave. The employee then asked for an 8 week extension that the employer approved. But when the time came for the employee to return to work, the employee submitted another note from their provider indicating that they are not ready to return and this new note did not provide a new return date.

 JAN's cognitive team frequently sees this type of scenario related to mental health but it also comes up for other things like cancer treatments. Regardless of the situation, though, the question will be posed as how much leave is required when someone needs extended leave. Where can an employer draw the line? This is a tough question because the answer is that it depends upon the situation. It's a gray area under the ADA.

 Here the employer responded in a way that we offer as a practical approach because the new note did not have a date of return the employer reached out to request a firm return-to-work date at this time. In these situations, the employer likely can take into consideration the amount of leave that has already been granted and use the new return-to-work date to establish if more leave can be provided at this time based upon current business needs.

 In this particular case because no return date could be given at all the employer determined that they could no longer provide additional leave and keep the position open for the employee to return to it.

 >> LISA MATHESS: Okay we've offered some basic accommodation situation example that review -- now we'll review best practices but we wanted to share a few more to illustrate how stay-at-work and return-to-work programs can overlap with ADA accommodations and these situations are real life JAN consultations.

 In our first example we have a cashier who was released to return to work following a knee replacement surgery she had standing restrictions it's not uncommon for an employer to have a policy indicating that cashiers must stand but in the reality of it, the job of a cashier could be performed while seated so the employer would need to consider modifying these policies for employees covered under the ADA.

 So the employer contacted JAN looking for possible accommodations. A JAN consultant discussed the use of a stand/lean stool behind the cashier counter. These stools allow people to alternate between sitting and perching on it, it could be perfect for tight spaces like behind a checkout counter the employer could continue to apply the policy prohibiting the use of stools to other situation but in this situation the employer provided this product while modifying the company policy which allowed the employee to get back on the job during that recovery period.

 In this example an accountant with cancer requested a modified schedule while undergoing treatment. For some individuals who have cancer, treatments may necessitate that the person be on leave continuously but for others it may be that the person is able to return to work and work around the treatments and if the schedule permits they may not need to pull from FMLA or ADA leave.

 So in this case the employer was not able to modify the employee's schedule but as an alternative the employer allowed the employee to work from home on days when they had treatment and provided a laptop. The important thing to mention with this situation is that the employer's obligation to accommodate didn't stop with the determination that the modified schedule couldn't be provided. In situations where the accommodation being requested is not feasible, doable or would pose an undue hardship an employer must still consider effective alternatives that would enable the employee to continue working in lieu of taking leave.

 >> MATTHEW McCORD: In our next example a home health nurse returned to work following a multiple sclerosis flare-up she was experiencing body weakness and fatigue which made it hard to lift patients. Lifting patients was considered an essential part of her job when working with clients who were immobile or needed assistance with various activities of daily living.

 After contacting JAN and discussing option, the employer assigned the nurse to clients that were more mobile and looked into purchasing patient lifts.

 With these accommodations in place the employee did not need to remain on leave for longer than necessary and was able to safely work with clients that the employer felt didn't need as much physical assistance.

 Here a CNA was on leave due to depression her doctor eventually released her to work on light duty. Her medications were causing muscle weakness and concentration issues.

 Unfortunately, her employer told her to either return to work at full capacity or resign.

 The employee contacted JAN. And a consultant suggested that she make a formal written accommodation request citing the ADA. In this case she requested temporary reassignment to an office clerical job. This way the muscle weakness and concentration issues wouldn't interfere with her tasks.

 She needed this on a temporary basis. As she would eventually adjust to her new medications and these side effects would go away or at least lessen while it is not required to place requests in writing or even reference the ADA when you do so it can at times be helpful as it was for this individual to do.

 >> LISA MATHESS: Now let me take you through an example that focuses on productivity requirements. Here we have a secretary with an arm impairment who couldn't type as fast as she used to her productivity was falling behind. Her employer wanted to put her on leave until she was medically recovered remember from Matt's discussion on leave if there are accommodations that would enable an employee to stay or return to work an employer shouldn't try to push an employee out on leave instead.

 In this situation we were actually working with the individual. So after consulting with JAN the employee requested a one handed keyboard and a hands free headset as accommodations that could be in place of her taking leave. These assistive technologies enabled her to meet production standards while staying at work.

 An employee was a janitor and happened to have a seizure and is now restricted from working on a ladder as his doctor felt he was unsafe to do that type of work he can perform all of the functions of his job except for the task of maintaining the overhead lighting fixture.

 So here we have what we consider job restructuring. The employer swapped these job functions for two employees so the employee from the last slide was given the duty to clean a small kitchen in the employee lounge and the person who originally cleaned the kitchen could now do the light fixture since they weren't limited in the ladder climb. Another alternative is looking at safety harnesses or a lift but here we just did a swap of the two job tasks.

 >> MATTHEW McCORD: Here is a situation where an employee voluntarily admitted herself to a hospital due to severe depression symptoms that she was experiencing. Because it was so sudden, the employee's mother called the employer to let them know of the situation and tell them that the return date was uncertain at this time. The employer initiated leave as an accommodation for the employee and requested that the mother keep them informed about any progress and an approximate return-to-work date as soon as possible. This example highlights a few important things first if needed someone can make a request on the behalf of an employee. Here the mother was able to call and talk with the employer and we often recommend to employees that if they are for any reason unable to reach out, try to have a friend or family member do so on their behalf this way the employer is informed as quickly as possible. The employer took this information and didn't jump the gun by saying that with no return date they can't do anything. Instead, given the situation, they went ahead and enacted a temporary accommodation and simply required the mother update them and get them the information they needed as soon as possible. This provided the employee with what they needed while also allowing the employer to get the supporting documentation that they needed to assess what might be possible absent undue hardship.

 Here are some other partnerships that may play an important role in either developing or maintaining a successful return-to-work or stay-at-work program. Disability related benefits programs, as we mentioned earlier, there may be some overlap of coverage for employees so we want to be aware of other laws to consider and other programs that may grant benefits such as FMLA or workers compensation.

 Employers will want to check for eligibility under those programs separately. Employee Assistance Programs. Often companies have these programs called EAPs, that provide services to employees that are having performance problems in their jobs or struggling with personal issues such as home life or medical issues. These programs are really designed to benefit the employee so these EAPs can help facilitate a transition back to work, as well.

 Wellness or healthcare benefits programs these are voluntary benefits that can help improve your overall general health. The premise is to hopefully prevent chronic illness, again, this may help someone stay at work. And of course JAN. Let's not forget that JAN and our consultants are here to provide a partnership to employers who are seeking out information relating to accommodating an employee and ADA compliance.

 So never hesitate to give us a call. Or chat with us to get more tailored information on the right side of this slide there's a screenshot of the publication Lisa mentioned earlier the direct link to where you can find is again learning disability right below the screenshot here are some additional organizations that are affiliated with the Department of Labor's that can be helpful when establishing a return-to-work and stay-at-work program. EARN or the Employer Assistance and Resource Network for disability inclusion provides information on financial incentives to establish stay-at-work or return-to-work programs. Including workplace safety and illness and injury provision programs. 85 to 90% of the incentives discussed on EARN's page are for employers who are assisting employees in staying at work or returning to work.

 Also the Campaign for Disability Employment has released a PSA relating to return-to-work or stay-at-work programs. This can be a good tool to help educate people about the benefits of these types of programs, as well. We will leave you here with our additional contact information. And can now move on to some questions.

 >> LISA MATHESS: Okay. Matt, I have one for you, how are marginal tasks determined? Should this be something noted on a job description?

 >> MATTHEW McCORD: It can be helpful for marginal tasks to be noted on job descriptions but it's important to remember that job descriptions are only tools. The way that you want to go about determining what is essential and what is marginal is by doing a case-by-case analysis of what actually is done by the person in that job. It's kind of like the discussion that we had earlier about blanket exclusions. You don't want to make a blanket statement about what's required in a job. Even if it's two jobs that are exactly the same like two janitors, those two janitors might have very different things they have to do like the one person who had to climb the ladder and clean the light fixtures and the other person who had to clean the kitchen. Those are two different tasks and it's important to figure out whether that person's essential or marginal jobs are one or the other so that way we can figure out what can be reallocated and what cannot.

 >> LISA MATHESS: That makes sense.

 Okay I think this one came in while you were talking about leave. In this example I'll actually talk about it because I'm on this lineup but the example they gave was an employee is on leave of absence for pregnancy after she exhausted PDL time reaccommodated for an extension now she's asking for another extension do we have to do that? And if we do, do we have to have a doctor complete a form.

 So with pregnancy there's a couple of things you want to think about, first, a typical pregnancy is probably not considered a disability under the Americans With Disabilities Act.

 So you're going to want to sort out does this pregnant woman have an underlying medical condition that that may get her ADA coverage does she have that underlying issue that's substantially limiting a major life activity that's maybe exacerbated because she's pregnant therefore then she might get ADA coverage but pregnancy by itself isn't an ADA thing that's why we tell employers to check state laws and definitely learn about your responsibilities under the Pregnancy Discrimination Act. And if you need more information on the Pregnancy Discrimination Act, EEOC has lots of information on their Website www.EEOC.gov. They enforce the Pregnancy Discrimination Act. So if you need any information about pregnancy discrimination, check out the EEOC. So let's assume that this pregnant woman does have an underlying medical condition and she's covered by the ADA now she's requesting extension after extension after extension. According to the EEOC, although employers may have to grant extended medical leave as an accommodation they don't have an obligation to provide leave of an indefinite duration which could be defined as the repeated extension of leave. Those could be requests for an indefinite leave so that's why employers are encouraged to request an anticipated date of return even if it's not an absolute date and kind of engage in the Interactive Process at that point and see what they can do with that employee or if at that point there's workplace accommodations that can bring that individual back to work. But it looks like we're wrapping up on time so that is all of the time we're going to have for questions today but don't hesitate to email us at JAN@askjan.org or live chat on askJAN.org and we'll definitely go through any accommodation issues you may have.

So if you need additional information, you want to discuss something specifically, feel free to contact us. We want to thank you for attending.

 And thank you to Alternative Communication Services for providing the net captioning.

 We hope the program was useful. As mentioned earlier, an evaluation form will automatically pop up on your screen in another window as soon as we're finished. We appreciate your feedback so we hope you will take a minute to complete that form and this concludes today's webcast.

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