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Best Practices for Complying with Section 501 of the
Rehabilitation Act (ADOBE)

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>> Hello everyone and welcome. Today's program features
Jeanne Goldberg. Before we meet Jeanne, we need to go over a
few housekeeping items. If you experience issues during the
webcast call us.

Before the end of the presentation, time allowing, we'll answer
any questions you have. You can send in your questions at any
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Finally, at the end of the webcast, an evaluation form will pop
up on your screen in another window. We appreciate and use your
feedback. Please stay logged on to fill out the evaluation
forms. Now let me introduce our featured speaker. Many of you
probably already know Jeanne from our prior webcast, but if you
don't, Jeanne is a Senior Attorney Advisor at the U.S. Equal
Employment Opportunity Commission located at their headquarters
in Washington, D.C. She advises the Commission on the
interpretation and application of the statutes that it enforces,
including the Americans with Disabilities Act. Today, Jeanne

will be sharing some of the latest developments in cases under the ADA and Section 501 of the Rehabilitation Act.

So Jeanne, thanks for being here today.

>> Thanks so much, Linda and let me just note, because even though this is billed as a session on the Rehabilitation Act, the same discrimination and accommodation standards apply under the ADA as for the federal sector under the Rehabilitation Act. I know we have a mixed audience today. The rules and issues we'll be talking about are the same under both the Rehab Act and the ADA with respect to employers.

>> All right, great, thanks and that definitely is good. We do have some nonfederal participants today. So let's start at the beginning and talk about who is covered by section 501, who is protected by section 501. One of the things we'll talk about is how to determine who has a disability. First we'll talk about how to determine whether someone is actually an employee of a federal agency.

And let me give you a scenario to set the stage here. A federal agency uses a federal contractor to run its cafeteria. The supervisor of the cafeteria has diabetes that was worsening over time. He asked a federal agency for a modified schedule until he could get his diabetes under control. The federal agency contacted the federal contractor and asked that the supervisor be replaced. So the question is, does the federal agency have any legal obligation to accommodate the supervisor?

Jeanne, can you talk about whether this supervisor in this example might be an employee of the federal agency?

>> Sure, they, they may indeed be. In any case, whether they are an employee of the agency or not, the agency, let me say, at the outset, cannot ask the -- would be potentially violating the law to ask the contractor to replace the worker with someone who did not require an accommodation. But as you teed it up, indeed, the agency, itself, may have a legal obligation to accommodate this individual, even though they've been provided, as a worker, by a contracting firm or staffing firm.

So, it might seem like a simple question, who's an employee? But...it's increasingly not. In most circumstances, a person is only protected by the EEO laws if he's an applicant or employee,

not an independent contractor, partner or other non-employee. The tricky part is that whether you're called an "employee" or called a "contractor" doesn't determine what you actually are, for purposes of the law. So, that, that's the first thing.

And the second thing is that there could actually be two employers. What we call "joint employers." So here, it's possible the federal agency and the outside firm that placed the worker at the agency site are both the individual's employers.

This question of whether an employer-employee relationship exists with respect to any entity is really fact-specific, and it depends primarily on who controls the means of the -- and manner, of the worker's performance. The Commission and courts look at the whole employment relationship and typically they look at these kinds of facts: Who has the right to control when, where and how the worker performs the job? Who provides the tools or materials or equipment? Is the work performed on the employer's premises? Is there a continuing relationship between the worker and employer on an ongoing basis (as opposed to, for example, the painter you might hire to paint the outside of your house -- that's a classic contractor-type relationship; it's a one-off). Does the employer have, does the entity have the right to assign additional projects to the worker? Does the entity set the hours of work and the duration of the job? Who pays the worker? Is there withholding? Are there benefits, you know, insurance, workers compensation? Who provides that? Is there, as I said, withholding for tax purposes? Who can discharge the worker? And you know, not all these facts have to be present, but just as I'm ticking those off, I'm sure it gave you some thoughts about this scenario and the fact that, indeed, even though a contracting firm provided the worker, it may indeed be that they are an employee for purposes of the EEO laws. An employee of the agency.

So...both in terms of the right to file a complaint with the federal agency's internal EEO office, and utilizing the 1614 complaint process, and in terms of in real-time, workers seeking assistance from management or a disability program manager with a harassment situation or reasonable accommodation requests, it's critically important not to assume that just because the worker is referred to as a "contractor" that the agency has no legal obligation.

So, let's look at a couple of recent examples. On slides five and six there's a description of a case, Complainant v.

Department of Transportation, decided by the Commission in the beginning of 2014. In this case, it was a security guard who was provided by an outside contractor. He alleged he was dismissed by agency decision for discriminatory reasons and he actually went to our, an EEOC field office, which is where we intake complaints by private sector employees and he sought to file a complaint there against the contractor, which he was entitled to do. We advised him that he had a right to see if he had a claim against the agency, if he believed the agency had a role in the discrimination, and to file with the agency's EEO office. When he did so, the agency dismissed saying number one, he's a contractor and number two, it was untimely.

On appeal, the Commission reversed the dismissal and said even if this worker didn't know that the agency could have been his joint employer, it was, in fact, possibly the case. And it was unlikely he would have known about the potential availability of the federal EEO process, and he was entitled to file his complaint and have the agency determine whether he was an employee of both the contractor and the agency, and would then be able to pursue his discrimination claim against each.

If you turn to slide six, you'll see that the Commission reiterated the kinds of factors here to see if the contractor and agency were joint employers, including the amount and type of control that each has over the complainant's work. And it would be improper to simply dismiss the complaint without looking into those facts and determining whether the complaint should be accepted because in reality, the individual was an employee of the agency or the agency was the worker's joint employer.

To use another example on slide seven: Complainant v. the Department of State. The Commission vacated a dismissal of complaint and remanded for the investigation a complaint by someone that was designated as a "contractor." The complainant worked on the agency premises, used the agency equipment, received his assignments from agency personnel, the agency controlled the details of his performance. And I'm sure, when you think about all kinds of folks at your agency -- IT, security, other roles -- many of them, even though everyone refers to them and the understanding is they're contractors, and they've been provided by an outside contracting firm, they may, in fact, also be employees of the agency considering these factors.

So, don't ignore accommodation requests from such individuals. Loop in and work with the contracting firm if necessary to provide any available accommodations, but keep in mind those Rehab Act obligations can apply to individuals known as "contractors" in your workplace. They, may, in fact, be identically situated to your "employees." Linda?

>> Thanks, Jeanne. Let's look at whether an employee has a disability, starting with having to determine whether an employee is substantially limited in a major life activity.

An example, an employee has a hernia and has been unable to return to work. He has asked to be assigned to a sedentary job. The employer is trying to determine whether this employee has a disability. I know you can't say for sure whether any individual person has a disability based on that little bit of information, but can you talk about how an employer might make this determination?

>> Sure, and then we'll talk about some of these examples, including hernias. So on slide nine is a reminder that when you're considering, after someone has requested accommodation, whether they have a disability within the meaning of the Rehabilitation Act, you have to remember that the ADA Amendments Act changed the definition of what it means to be substantially limited in a major life activity. The definition shall be construed in favor of broad coverage and not demand extensive analysis. The bottom line, it's much easier to meet the standard and it applies very broadly.

Turn to slide ten. The four main changes, just to recap, that the Amendments Act made to the definition of disability. Number one, the impairment doesn't have to prevent or significantly or severely restrict a major life activity. Number two, major life activities now include major bodily function. Number three, the ameliorative effects of mitigating measures are not considered - - such as medication, equipment and anything else that could lessen the symptoms of their condition -- are not considered. Rather, we look at the underlying impairment and whether that is substantially limiting on a major life activity. And number four, impairments that are episodic or in remission are substantially limiting if they would be when active.

Turn to slide eleven -- a quick reference to the resources you'd want to keep in mind if you are applying the standard in a given situation. A notice of rights on the ADA, there's a hyperlink there -- it's a one-page very simple and useful summary for employers and employees to use as a guide and reminder in this process. There's a question-and-answer guide on the ADA and a link to that.

Turning to slide 12, this goes to your question, Linda, about how courts are interpreting and applying the amended disability standard. Courts are applying the amended standard to easily find that individuals with a wide range of conditions, previously unprotected, meet the substantially limited standard. The turn-around in the case law is especially notable with respect to impairments such as cancer, diabetes, HIV, multiple sclerosis, and psychiatric conditions.

Going to your scenario about the hernia, yes, even hypertension, hernias, and other types of back and leg impairments that were often not found to be substantially limiting pre-Amendments Act are now being found to meet the disability standard.

If you'd like to see a discussion of court decisions applying the ADA to these types of impairments and others, look at the July 8, 2014 ADA update JAN webinar transcript on the JAN website. We reviewed many of them, including a decision that did find a herniated disc and resulting pain could be substantially limiting in walking, sleeping, lifting, et cetera, due to the medical restrictions the individual has, the pain involved and the difficulty, effort and time it would take to perform these major life activities compared to most people. Back impairments can also substantially limit musculoskeletal function. Keep in mind how broad a "disability" is.

>> Okay, great, what about pregnancy? We had an uptick in questions regarding pregnant women and whether they're covered by the ADA. Lots of questions. Here's a typical scenario that we get: A delivery driver is 5 months pregnant and has been placed on light duty restrictions by her doctor. The doctor indicates that the employee has a high-risk pregnancy due to her age and a previous miscarriage. Her employer is questioning whether she's entitled to accommodations. The big question is whether pregnancy can be a disability.

>> Right, good question. We get that quite frequently. So, turning to slide 14: Pregnancy, itself, is not an impairment. And that was true before the Amendments Act and after. It's not considered an impairment under the ADA, but the medical conditions or complications that are caused by the pregnancy may be covered as disabilities under the ADA. And examples of things that the courts have been finding might be covered as disabilities that are pregnancy-related impairments after the Amendments Act are fairly broad, including things that are temporary, such as pregnancy-related carpal tunnel syndrome, gestational diabetes, pregnancy-related sciatica, and preeclampsia.

So, whether it is a or not it is a temporary restriction that results from the pregnancy, it may be a substantially limiting impairment or create a record of -- past history -- of a substantially limiting impairment, entitling the individual to accommodation.

Don't forget that in the ADA regulatory appendix, there's an example of someone who has an impairment that results in a 20-pound lifting restriction, lasting or expected to last for several months. The Commission said that is an impairment that substantially limits the individual in a major life activity of lifting.

Let's look at a couple cases on slide 15: Heatherly v. Portillo's Hotdogs. The court held the high-risk pregnancy could be an impairment that rendered her substantially limited to lifting. Price v. UTI. The plaintiff had several different physiological disorders after giving birth by c-section. The court held that those impairments could substantially limit her reproductive system.

So, both of those are examples of pregnancy-related impairments that could be disabilities, and entitled to accommodations, even though pregnancy, itself, is not considered a disability under the ADA.

Turning to the next slide. 16. There are two new publications that came out last July from the EEOC on pregnancy. One is the EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, and there's the hyperlink there. The other is the Fact Sheet for Small Businesses on pregnancy discrimination.

Of course the rules are the same for employers of any size. This is a handy short pamphlet that reviews the basic rules.

So, these publications talk about rights under the EEO laws and obligations under the EEO laws, relating to pregnancy, under a variety of different statutes. They talk about the ADA impairments that are caused by pregnancy, that might be substantially limiting, or might fall under the second or third prongs of the disability definition. They also talk about obligations under the Pregnancy Discrimination Act, various Department of Labor rules regarding nursing, etc., so these are really useful, overall guides that pull everything together on pregnancy.

Turning to the next slide, 17. I did want to make sure to mention that there is a case, although it's not being heard by the Supreme Court under the ADA, it is a case involving pregnancy discrimination that is currently pending in the Supreme Court that is expected, the decision is expected by June. Under the Pregnancy Discrimination Act, separate and apart from the ADA, the court is considering what this obligation in the Pregnancy Discrimination Act means.

In this case, which is Young v. United Parcel Service, the issue is under what circumstances under the Pregnancy Discrimination Act, an employer that provides work accommodations to non-pregnant employees, they must do the same, to provide accommodations to pregnancy employees who are similar in their inability to work. This is a cutting edge issue. The Commission has said this obligation is very broad under the Pregnancy Discrimination Act. And we'll see what the Supreme Court rules.

I do want to also emphasize, however, that regardless of what the Supreme Court decides, the case again, as I said, only arises under the Pregnancy Discrimination Act in terms of the issue that the court has agreed to rule on. So everything that we've been discussing and that is reviewed in the EEOC Enforcement Guidance on Pregnancy Discrimination about the now very broad definition of disability under the ADA, it applies to pregnancy-related impairments and will still be in place regardless of how the Court rules on this Pregnancy Discrimination Act case. Linda?

>> Thanks for that, that is very interesting. It'll be

interesting to see what the Supreme Court does with that. Before we move to another topic, the last thing I wanted to ask you to talk about related to who's covered by the ADA and Rehab Act relates to people who use medical marijuana. This is an area where we're getting a lot of questions because of states in which there has been legalization of marijuana.

Here we have an employee working in a state that has legalized marijuana and that person has tested positive on a random drug test. The person then lets her employer know that she is using medical marijuana, that's why she tested positive. She asked her employer for assurance that the test outcome won't affect her employment. The employer isn't sure what its legal obligation is and whether the employee is protected from being terminated based on the positive drug test. Anything you can tell us about this topic, Jeanne?

>> Sure, we're getting this question a lot too, Linda, for the same reason you said. Increasingly, there are state laws that are legalizing medical use of marijuana or in some instances, recreational use. The ADA, in the statute itself, section 12210, specifically says that the term "individual with a disability" will not include an individual who is currently engaging in the illegal use of drugs, where it's alleged the employer acted on that basis.

In other words, where an employer takes action against an employee for the illegal use of drugs, the statute says that can't give rise to a discrimination claim under the ADA. And the ADA specifically defines, again, right in the statute, the illegal use of drugs by reference to what is unlawful under current federal law through the Controlled Substances Act. Looking at the statute, the courts that have considered this have said there's really no latitude for, for any conclusion, other than that even if it's legal under state law, it's still "illegal use" as defined under the ADA. Because the ADA defines "illegal use" based on federal law, not state law.

An example here, on slide 19, James v. City of Costa Mesa, a 9th Circuit decision about someone who was on doctor-supervised marijuana, used for treatment of a medical condition and then tested positive, and based on the drug test was terminated. They challenged it as discriminatory, and the court said, doctor-supervised marijuana use, even if permissible under state

law, even if doctor-ordered was "illegal use of drugs" and excluded from disability protections under the ADA.

That is how courts are viewing this. There are some other decisions that have come out similarly. I'm not aware of any that have ruled to the contrary.

Having said that, I should also note though there are some important ADA compliance issues that employers need to remember with respect to an employee who in the past had a diagnosed drug addiction. More than ten years ago, the Supreme Court ruled in a case called Hernandez that somebody who had a past drug addiction, and is now in rehabilitation or past that phase in recovery, could, based on that past drug addiction -- that could be an impairment and that gives them a "record of" a substantially limiting impairment under the ADA. And they might be entitled to accommodation for that past record of a disability. For example, somebody who no longer has the substantially limiting impairment, but needs the accommodation of a schedule change to attend NA meetings or an occasional exception to the "no personal phone calls" rule to contact the sponsor. or last-minute change in the break schedule to enable them to have a brief phone call with their sponsor, [due to their impairment of past drug addiction, even if it is not currently "substantially limiting"]. And also, that someone, you know -- where there's no defense that they're not qualified or they posed a direct threat to safety -- that someone couldn't be subject to disparate treatment [based on a past "record of" a drug addiction disability].

So, that's an important, separate issue to keep in mind, but as far as current illegal use of drugs as defined under the ADA, an employee or applicant is not going to be able to seek coverage under the ADA even if their state law sanctions their marijuana use.

>> All right, great. Complicated area. I think we're definitely going to see changes in the future on that issue.

>> Linda, one other thing I should mention, remember we talked in past webinars about disability -- the ADA rules on disability-related inquiries and medical confidentiality. And ... under the ADA, those rules, remember, apply to all applicants and employees and those could apply, also, to a

medically-diagnosed past drug addiction. So, there are a lot of protections for people who are in a recovery and have some past addiction that might be characterized as a disability under the ADA. The issue here is those engaged in *current* use, won't be able to seek any protections under the ADA on the basis of their -- their drug use.

>> Okay, good clarification. All right...let's move on to another topic and of course, one of my favorite topics. That's reasonable accommodation. And what we're going to cover here is a few issues, including choosing which accommodation to implement, what's required or allowed in the interactive process, including medical documentation, accommodations related to modified schedules, and telework as an accommodation.

So, let's start with choosing an accommodation and I'll give you a scenario, just to set the stage for this one. Here we have a nurse who has a medical condition that makes her sensitive to cold temperatures. She asked to be able to wear a fleece-lined jacket over her uniform. Her employer doesn't want her to cover up her uniform for various business-related reasons, but said she could wear it under her uniform or use hand warmers in her gloves. The employee insists that she be allowed to wear her jacket over her uniform, it'll be easier for her and more comfortable and refuses to consider other options. Can you talk about an employer's rights and obligations when choosing an accommodation?

>> Sure, we're now at slide 22. While primary consideration should be given to the employee's requested accommodation -- here, that'd be, let me wear a jacket over my uniform -- an employer has the discretion to choose among equally effective alternative accommodations, so...as long as the accommodation the employer provides is effective, the employer is allowed to go with its accommodation idea. They should, of course, act promptly to avoid undue delay if they're going to have a back and forth with the employee to figure out what an alternative solution will be. But here...in this scenario you posed, whether the employer's reasons for not wanting the jacket to be over the uniform are you know, business-related or just the employer's arbitrary preference, it doesn't matter if there's an alternative. If the employer offers something that meets the employee's medical restrictions

and is you know, in that regard, an effective reasonable accommodation, the employer will have met its obligation.

So, if this kind of dispute were to come before a court or the Commission, there may be some real digging into the facts about what it was about the employer's alternative that the employee claimed was insufficient and whether she was correct. In other words...was she not going to be able, if she wore the jacket under the uniform that the employer proposed, to move sufficiently to have the right degree of mobility and flexibility with her arms to perform her tasks? You obviously have to consider that. All of this would be delved into if the employer and employee really couldn't work this out between themselves.

Look at slide 23, it's a quick recap of things the employer is not required to do as an accommodation. The first is lowering production or employment standards -- how much work gets done and the quality of it. The employer never has to lower those as an accommodation. The accommodation is to help the employee meet those standards. Also, the employer doesn't have to excuse violations of conduct rules that are uniformly applied and job-related. So even if, for example, as we've seen in some recent courts decisions, the employee, for example, engaged in harassment of another employee, but it was the disability that caused the misconduct, that wouldn't be a reason why the employer has to excuse the misconduct. If it's a uniformly-applied rule, job-related, the employer can impose the same consequence for a violation as they would for any other employee. Even if disability played a role.

In addition, the employer doesn't have to remove an essential function of the job. So, if the employee, even with an accommodation, cannot perform the essential functions of this position, then we would be looking at, can they be reassigned to a position for which they're qualified -- that is at their same level, or the next closest, not a promotion, not creating a position, and not bumping anyone else out.

So...those are some key ones, also, you'll see on this list, the employer doesn't have to change someone's supervisor as an accommodation. But changing supervisory methods might be required, for example, someone who needs to receive work instructions in writing so they can go back and review them, rather than verbally.

And of course, finally, the statutory defense that an employer doesn't have to provide an accommodation if it would result in undue hardship -- significant difficulty or expense.

Turning quickly to slide 24. We'll see examples of common types of accommodations. One that I wanted to mention in particular is "making exceptions to policies" that you'll see in the middle of the bulleted list. This is something that's easy to overlook because many employers, whether they're in the government or private sector have all kinds of rules, policies, procedures, and they don't all say on the bottom of each page, but, we might need to make an exception as a disability accommodation or a religious accommodation. It's an easy, easy thing for, for managers and supervisors to mistakenly miss. That they might -- while they can keep the policies as to everybody else, they may have to make an exception for disability accommodation if it wouldn't result in an undue hardship.

Another one on this list we've had a lot of questions about is leave. Leave is unpaid leave. It comes up under the ADA when someone has used up or doesn't have available any FMLA or accrued leave, and they need initial unpaid time off in order to receive treatment or recuperate, related to a disability, and/or sometimes it might be for, for example, training with a new service animal. Then, that's where leave as an accommodation comes up. And where employers claim that it's too much leave, it's too much of a hardship, the things that the Commission looks at are really, you know, is the frequency of the leave (if it's intermittent), the length of it, or the unpredictability of it, the unscheduled nature of it -- if it's so disruptive that it would be an undue hardship for the employer. Can someone else be hired to perform it who has the same skillset or someone else transferred into that position? What would be the consequences of granting the leave? Those are ones we get questions about a lot. The other one that will jump out at you is telework, we'll talk about that in a moment. Linda.

>> Next up we have a scenario related to the interactive process/medical documentation. We have a social worker with attention deficit disorder having trouble keeping up with her paperwork. She provided a note from her doctor saying she has ADD and asked her employer to allow her more time to do paperwork. Her employer placed her on leave pending more information. The employer says it will not grant the requested

accommodation, but needs the medical information to decide if there might be an alternative it can provide.

So, the question, can you discuss whether this is a good approach and if not, what might be better?

>> Sure, first off. Let me just say, this is a really common way that accommodation requests come up. Where the employee might ask for something that they actually are not entitled to under the law. Remember I just said that the employer doesn't have to lower the standards for how much work you do or are expected to get done as an accommodation.

So...this is really common, lower my caseload or allow me more time to complete the paperwork. It is an accommodation request, because she's asking for a change and clearly it's, she's relating it to a medical condition. However, what she's asked for is not something that she can have. And...so, the employer is correct that they're permitted to tell her: we can't give you that, but...we recognize you've requested accommodation and let's see what we can do for you.

What's a clear though, employer mistake in your scenario is putting the employee on leave pending receipt of the medical information. The employer's allowed to ask for more if it needs it in order to determine if she -- her ADD is a substantially limiting impairment and what accommodations she needs or if, medically, she does need accommodation at all, and what could be provided. But it's not permitted to simply put her on leave during that process of gathering information unless what's been revealed is that she actually can't do the job. It doesn't sound like that's the case here, doesn't sound like she's said she has medical restrictions that prohibit her from being able to actually perform her functions, she's just saying she could do better and more if she had an accommodation.

So...it seems, from what you've written, that the employer was making a big mistake here by putting the employee -- insisting the employee take leave pending the interactive process.

So, let's look at what the employer could do in terms of proceeding. Next slide. Keys to the interactive process. Obviously, communicating, exchanging information, searching for solutions, consulting resources as needed.

I think behind your question to me, Linda, was the feeling that maybe having the dialogue -- a way to describe the scenario -- the employer may have put the employee off. This is the management issue about how you have this dialogue. Here, the employer has part of the information, the employer is going to have an exchange here that is about the law, and what it does and doesn't require -- so, some things that the employer is not going to do. And here, they're not going to provide her preferred accommodation of lowering her, her caseload, or giving her more time to complete it.

On the other hand, they have an obligation to search for solutions, consult outside resources or do whatever might be useful to them if they need to do that in order to find a solution, an alternative that they could offer.

So, if you look in the middle of the slide [26, second and third bullets]: Sort of like two sides of the coin.

If the employee, the requester only knows the problem, not the solution, the employer is still obligated to provide a solution. If she just said, because of my ADD, I'm not getting my work done in time. That could be a request for an accommodation. She's not asking for a particular solution, she doesn't know what it is, the employer has an obligation in real-time to look for an accommodation that could be provided in cooperation with the employee.

The flipside of that, third bullet on slide 26, which is this scenario, the employee asks for a particular accommodation, but she asked for one that doesn't have to be provided. The employer still has to provide an accommodation -- they have to search for and consider if there are alternative accommodations.

Something I want to emphasize here because we are mostly on this call today, federal sector folks is that this describes the process that occurs in real-time. In an EEO case, for any who works in agency EEO offices, it's after the fact and there's an allegation of denial of accommodation, there's no violation of the law for failing to engage in the interactive process at all -- the violation, if there is one, is for failing to provide an available accommodation that would not have posed an undue hardship. So...this is how it's useful for an employer to go about its obligations, but the legal obligation is to provide

accommodation, not to have this process. So the violation of the Rehab Act, if you find one is because there was an available accommodation that could have been provided and should have been provided, but wasn't. Sometimes, however, in the EEO cases, this interactive process does feature: It's clear the person requested accommodation, it's clear there was an accommodation that could have been provided without undue hardship. It's not clear whose fault it was that it wasn't provided. So then we look at, in sorting out the EEO claim and whether the employer is liable for denial of accommodation, whether the employer fell down in the interactive process or the employee did.

Let's look at slide 27. Suppose, as here, with this ADD scenario, the employer says I need more medical information or I need more supporting information of any sort.

So...the accommodation request could be oral, like in this case, it doesn't have to be in writing. A request for some type of change due to a medical condition. Once that's made, then the employer can ask, just as they could pre-Amendments Act, for supporting medical information if it's not obvious or already known that the person has a disability. So the employer can ask for reasonable documentation, that the employee has a disability, a substantially-limiting impairment or a history of that and that they currently need the accommodation requested.

So those are two separate things. They have a disability and they need what they're asking for. But there can also be more to this dialogue. Let's, let's look at the next slide, 28. The -- there's two ways to go about this. The employer can ask the employee to go to their doctor themselves and obtain supporting medical information from the health care provider, or they can ask the employee to sign a limited release that allows the employer to contact the health care provider directly.

So...either way, this generally involves verifying the diagnosis, what the limitations are, and there could be more beyond the medical information. There could be follow-up to clarify with the doctor about what the doctor has said as to the person's limitations, and as to what accommodation might be needed. Part of inquiry is to allow the employer to determine not only that the person has a disability but what medically the individual needs, and if the employer wants to consider alternatives of their own choosing, then they can have that dialogue. They can propose things to the physician and ask what he thinks -- if this alternative meets their medical

restrictions. Or they might want to ask the physician whether there are alternative accommodations that would, that the doctor can think of, that would meet the individual's medical restrictions.

So, all of that can be achieved in this back and forth with the treating health care provider. That's perfectly permissible for the employer. There's no special protocol that has to be followed like under the FMLA.

Turning to the next slide [Ward v. McDonald]. This employee had severe lymphedema. She provided medical documentation asking to work from home. The employer asked for clarifying follow-up medical information. She provided another letter from an internist and it described, it made a reference in the doctor's letter to the fact that when she had the swelling, she needs to apply treatment and the treatment routines can take anywhere from one to three hours a day.

So the employer said, how can she work from home? Wouldn't you know, sitting at a desk for long periods of time for her work be affected whether she was doing that in the office or doing it at home, and she has periods where she needs to take this time off. How is this telework going to work? The employee refused to provide clarifying information from her physician, so the court rules she couldn't prevail on her denial of accommodation claim.

This is a classic scenario where the employer was legitimately trying to flesh out what the restrictions were, how the accommodation was going to assist the individual, what the, what the story was, and the employee didn't cooperate in providing that information or allowing her doctor to do so, so the employee couldn't prevail on the accommodation claim. The employee, in other words, fell down in the interactive process.

Just take a look at another example, goes the other way, Horn v. Knight Facilities. A different situation, this involves an overnight janitor who proposed accommodations for her chemical sensitivity to cleaning products, but the accommodations she proposed were not objectively reasonable. When the court looked at her claim and the back and forth that had gone on between the employer and the employee, they found that the employer had tried a variety of accommodation ideas, including modifying her cleaning route -- she had had to clean all the bathrooms overnight, instead they changed her assigned route to be half bathrooms, half offices. That was when her, you know, initial

restriction was she couldn't be exposed so much to bathroom cleaning chemicals.

Then her physician modified her restrictions and said she's getting symptoms of respiratory distress, intense respiratory distress, she can't be exposed to the chemicals at all. She brought an ADA denial of accommodation claim when the employer said there was nothing more they could do. The court agreed with the employer, there was nothing more they could do. The employer was entitled to rely on the physician's representation that she can't be exposed to these chemicals, and there was no other way to do the cleaning job but to be exposed to chemicals used to do the cleaning. The court agreed with the employer, this wasn't a situation where substitute chemicals were suggested that were a reasonable alternative, or any alternative way that could be permitted as an accommodation to perform the cleaning function, that would have enabled the individual to do her job and meet her medical restrictions.

We've certainly looked at cases in the past, you'll recall on these webinars, where wearing a facemask or respirator, some sort of covering, could permit the individual to do their job notwithstanding a respiratory disability. Having that back-and-forth, and not falling down on that, that effort each time to respond to the restrictions and see if there was something they could provide. And that's certainly the requirement on the employer's part.

Turning to slide 31, the employee in this Horn case also argued that the interactive process that the employer used was insufficient, because the employer spoke separately to her and her doctor when parsing through about her respiratory condition and restrictions and what accommodations might work.

The court disagreed, and held that the interactive process doesn't have to follow a particular format. The employer could have separate conversations with the treating physician, the employee, and the union representative. The key thing was that the employer was asking questions, gathering information, including giving the doctor a copy of the job description, explaining what the functions were that had to be performed, and asking the doctor whether there was any alternative accommodation the doctor could think of that would enable the employee to perform her functions.

So the key is that the relevant information was sought and considered, not whether it was done by letter or e-mail or phone, or by communications to which the employee was not a party.

Now, certainly, as a best practice, I'd say, employers should share the information they gather with the employee and there's, there's absolutely nothing to be gained in hiding the ball. But the ADA doesn't micromanage the format that this communication process takes. And surely, Linda, you've seen this situation as well.

>> Definitely, yeah.

>> Let's look at one more example on interactive process. A recent case on slide 32. EEOC v. Kohl's Department Store. You might be surprised I'm talking about a loss, but I think it's a good example of the incredibly fact-specific analysis that courts are getting into, figuring out whether the employer acted in good faith and fulfilled his obligation to try to see if there was an available accommodation before ultimately saying no.

This case involved a retail sales associate, she had diabetes, trouble managing her -- controlling her blood sugar due to the rotating and swing shift schedule that the retail staff was required to work on. And...she sought to have a straight, set schedule, instead of these overnight and rotating evening shifts and morning shifts, and all these changes.

The court said an employee's request for accommodation sometimes creates a duty on the part of the employer under the ADA to engage in an interactive process that involves an informal dialogue between the employee and the employer in which the two parties discuss the issues affecting the employee and potential reasonable accommodations that might address those issues. That also requires bilateral cooperation and communication. And...in this case, applying that generally-accepted standard, they said the employer was permitted to handle the situation as they did and here's what they did.

The manager, handling the accommodation request, said we can't, we can't give you the 9:00 to 5:00 schedule you want. And ... then, offered to, you know, talk about some alternatives. And the court said, and then the employee refused to have the further conversation, thinking that, hey, her request had been denied, and the main thing she needed they said they wouldn't provide.

The court said empty gestures on the part of the employer will not satisfy the good faith standard. But here, it was the employee who failed to engage in the interactive process. Once the manager told her that corporate headquarters would not agree to the 9:00 to 5:00 schedule she requested, she resigned and wouldn't reconsider, despite the manager's two attempts to ask her to discuss and consider alternative accommodations.

So...this is really interesting, it does point out sort of the, the initial scenario Linda started with about the nuances and the atmospherics of having this dialogue between manager and employee when the employee is asking for an accommodation that either the employer legally doesn't have to provide under the ADA, or the employer has concluded is simply unavailable as a matter of feasibility or undue hardship.

The employer, when doing that, should certainly make sure that in its communications with the employee, make clear that they're open to looking at alternatives, find out if there are any alternatives that an employee or their physician might suggest, to work together and make sure you've made that effort.

To show you how fact-specific it is, the dissent in this case said that -- a judge dissenting from the appellate panel said they thought the employer didn't engage in good faith and the interactive process. When they had this conversation with the employee, they led her to believe she wasn't going to get -- get anything departing from the set schedules that were available to everybody else. So there was no point in continuing the dialogue. And you can see, from the description of the facts, how that could be a possible conclusion here too.

So you know, a bit of a dispute between the parties about the, you know, what the dissent called the employer's "negotiating tactics." I think the upshot for us, in day-to-day compliance, is it's really in the employer's interest to be up front and take care to be transparent. Because otherwise, in hindsight, it may look like bad faith in hiding the ball, even if what you need to tell the employee is something they may not want to hear, we can't give you extra time, we can't lower your production standards, we can't give you that particular schedule, but you can make clear, let's have a dialogue and see what else we can do that may make it possible for us and you to meet your medical restrictions and our workplace requirements.

So...that's something to keep in mind. You see on the next slide a recap to look at later of the hallmarks of the interactive process described in the ADA regulation. Linda?

>> Thank you. We get a lot of questions related to scheduling issues and a couple that are really, coming up a lot, related to flexibility in somebody's schedule and then also, excusing employees from working overtime. I wondered if you could talk in more detail about scheduling issues?

>> Sure. We'll start on slide 37, two recent examples. Both involving government employers. The first in Solomon v. Vilsack. The employee sought the maxi-flex schedule as a reasonable accommodation and the employer, the agency, had taken a position, we've got nobody who is doing that -- that may, in theory, exist in the OPM rules, but we've got nobody doing that and we can't imagine doing that. And what it would have involved is working hours beyond those that anyone else was working, including supervisors, so the employee would have been taking some time off the clock during the day, in this case, if her symptoms were flaring up, and then working longer during that day to make sure she got in her full number of hours.

In scrutinizing whether this would have been an available accommodation that didn't pose an undue hardship, the court looked at the specifics not only of how this person did their work, in other words, is it someone who, where there's a need to have -- be working at the identical time as a supervisor, where there's that kind of supervisory oversight given in realtime? Or any other considerations related to security, quality standards, or anything else, where there's an employer interest in having this person not work a maxi-flex schedule? They looked at performance issues and they said there are no performance issues. This is an individual seeking an accommodation to accommodate their medical needs, but according to the employer, their work had been completely unaffected. So that really undermined the employer's ability to argue that this type of accommodation was off -- schedule change was off the table. So the court said, you look at the given position in a case-by-case inquiry, looking at the kinds of facts I just mentioned.

In McMillan v. City of New York, the employee arrived much later than other employees and worked much later on a daily basis. And ... the, again, the court looked at, what are the mechanics

of this person's workplace, such that it might not be feasible or pose a hardship for the employer for the employee's hours to not match a supervisor's hours? There's no contemporaneous supervisor. The schedule has been permitted for a number of years, no concerns by the employer, and in fact, this was someone who performed a lot of their work out in the field and it wasn't as if on an hourly or daily basis, even, that they you know, checked in with the supervisor. They filed all kinds of reports and took other actions. They needed to be able to work in the field during hours when the fieldwork could be done. And that could certainly be an important consideration, but the mismatch with the supervisor's hours wasn't viewed as a problem.

So...I think, you know, that, that presence at a specific time is something that is really easy to fall into thinking, it's nonnegotiable, because of habit, because it's what everybody else does, but it might need to be varied for somebody as part of their schedule in that regard as a reasonable accommodation, depending on the facts.

Here's another example, turning to slide 38. An important decision issued by the Commission in Petitioner v. Department of Homeland Security. It [ultimately] went to a Special Panel with a member appointed by the President. In this decision, this case involved a customs and border protection officer and he had sleep apnea, and asked to modify his work schedule so he could work straight day shifts, no graveyard and overnight shifts and no overtime shifts. He needed that regular schedule relating to his disability. And it was denied. You've seen this before. Denied, work a regular schedule, apply for disability retirement or resign. Go ask for this reasonable accommodation. He did ask for accommodations, modified work schedule or reassignment to a division that didn't have a graveyard shift, but that was denied. It was ruled he was an individual with a disability due to sleep apnea. The agency, the Homeland Security agency, had initially found that although he had a disability, he wasn't qualified, because they said working rotating shifts and performing substantial amounts of overtime were essential functions of the job. He ended up being removed and there was no vacancy that he could be resigned to.

In this review, by EEOC, differing with the MSPB - we'll move to slide 40 -- you'll see here, the holding: the Commission noted there's a strong temptation to think of the schedule as an essential function. The fact that attendance can be a condition

precedent to performing a function doesn't render it a job function in and of itself. Instead, attendance and timing are methods by which a person accomplishes essential functions of the job. So continuing into slide 41, in this case there was no question, the Commission said, that the petitioner could perform his essential duties while he was at work. He could do the patrol officer, or protection officer duties, so he was qualified. The issue is was the employer correct that it had to deny the accommodation. Has the employer shown that giving this person straight schedule, no graveyard shifts, no overtime, would have posed an undue hardship? That's the analysis that the Commission looks for in these cases.

Here, they said, the evidence was undisputed that the agency allowed other employees in the facility to swap shifts with each other and that they also exempted certain employees from working the graveyard shift altogether. They had about 700 officers in this kind of position, and only a much smaller number were working on duty at any given time, so they had a much deeper roster and that's often the important relevant fact in these scheduling cases -- does the employer have other people they can put on without violating, you know, others' rights under a CBA. And ... you see here, on slide 42, that Homeland Security conceded there was no significant disruption that occurred when it excused him from the grave -- performing the graveyard shifts for the prior year and a half.

So that undermined their contention that there was undue hardship to continue the accommodation. And also, the Commission said that other officers, as I said, were allowed this flexibility to adjust their work schedule for various reasons -- training, leave, unexpected emergencies, and pregnancy. The agency had a policy of exempting female officers who were pregnant or breastfeeding from working the graveyard shift for up to two years per child.

So, great that they had that flexibility for other employees, and not to take away from that, but rather that that showed that it wouldn't have been an undue hardship to accommodate, with similar flexibility, this individual patrol officer for disability-related conditions under the Rehab Act.

Finally, on slide 43, the Commission rejected generalized assertions by the agency officials that unlike these temporary changes they made for other employees, permitting such a permanent schedule modification would lower morale. The

Commission said an employer can't claim that undue hardship based on the fact that provision of reasonable accommodation might have negative impact down the road for other employees. They can't claim undue hardship on that basis. That's directly from the EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship.

Moreover, the Commission said our Enforcement Guidance commands an employer must provide a modified schedule even if it doesn't provide such schedules for other employees -- obviously you need to look at the kinds of undue hardship facts if you're asking for requests to modify schedules or working overtime. Linda?

>> Thanks, Jeanne, that case on overtime, that's extremely important. I think the language used in that would be really helpful. Is that case on the EEOC site?

>> I believe it is, we'll get you a copy and you can add it to the handouts that you post on the website for the webinar today.

>> That'd be really helpful.

So, we're getting to the final area that we want to talk about today and that is reasonable accommodation related to telework. And I can't tell you how many questions we get in this area, so...I'll just ask if you could discuss telework in general as a reasonable accommodation, and share any cases that you have in this area?

>> Sure, we're on slide 45 here. There are many situations where reasonable accommodation could include telework and you know, obviously with modern technology, which is you know, evolving daily, a lot of workers can now perform their jobs from alternative locations like a home office. The question that I know we deal with at EEOC and that you deal with at JAN that employers have top of mind is you know, when, when, under what circumstances, would it be appropriate to provide telework as a reasonable accommodation?

So, when someone has a disability and telework is the requested accommodation, sometimes this comes up because due to mobility impairments, for example, interferes with commuting, you have this question, when is physical presence necessary and therefore telework cannot be allowed.

In other words, when is telework feasible and when is it undue hardship circumstances you're looking at? I know a lot of federal agencies have a telework policy for all employees that says if you've been employed for at least a year, you can telework up to this number of days per pay period. It's fine to have that, such a policy, that generally governs employee telework, however, you've got to make sure that managers and supervisors are aware that they may be required to grant telework beyond what's provided for in that policy as a reasonable accommodation for someone with a disability. For example, granting telework for someone who has been with the company less than one year, or someone who needs to telework more than one day a week - you may need to go beyond [your usual rule] as a disability accommodation.

Let's look at the kinds of facts that you focus on to make this decision. Slide 46. You really may need to look at very, very fact-specific considerations. Courts and EEOC look at granular facts, starting with the duties, how they're performed. Is this worker interacting with customers and clients who are physically coming into the workplace? Is this person working with materials that can't leave the workplace and can't be handled electronically? Do they need to be supervised by a manager in a way that can't be done electronically or over the phone? And requires physically being in the same location?

So these are all things that you may consider and you see some additional facts listed there on slide 46.

47. It has increasingly been the case that we need to remind employers not to deny a request for telework as an accommodation solely because a job involves some contact and coordination with other employees. Frequently, it may be the case that meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail. The fact there is interaction with coworkers, the fact that somebody is a manager who is supervising subordinates and needs to communicate through the day, is not dispositive and by no means precludes telework in and of itself -- you have to look at those more down-in-the-weeds facts I just talked about.

Let's look at a case that has really been in the news a lot over the past year, slide 48. EEOC v. Ford Motor Company. This is closely watched, with the 6th Circuit decision now being re-considered by the full appellate court. In this case, the employee did have to work with others. She bought parts in

large quantities for Ford Motors, it involved a lot of technologies, being online, bidding on things from vendors in large quantities, might be being sold in other countries, different time zones, so it was fairly time-specific work that she had to do in making these bids, and it was interactive in terms of the co-workers and customers and vendors, the court said -- that she had to work with others in terms of interacting the employer said as a team with her coworkers to make decisions about the purchases, about what they needed, about whether it was the right price.

The court said there was -- the court said that there was evidence that even when she was at work, physically, this interaction was mostly done by phone and e-mail with her teammates, and that she did need to be able to work during the required hours because it was time sensitive in terms of interacting with both vendors and coworkers during specified hours to accomplish the work -- but that the evidence was that she could do it from a remote location. And ... the panel said --if you look on page, on slide 49, that given the modern advances in technology, attendance can no longer be assumed to be physical presence of the employer's location. The law must respond to the advance of technology and the employment context, as it has in other areas of modern life and recognize the workplace is anywhere that an employee can perform her job duties.

The question that the appellate court is considering, now, is, as the full court reconsiders this decision, is whether that team work with the coworkers and interaction with the vendors, whether something about it was compromised in terms of the ability to do it, by doing it remotely. So...this is a really cutting edge issue.

We get this inquiry a lot about team work. I think the important takeaway is to keep in mind that just because there's team work involved, just because there's interaction involved, doesn't mean that telework is not a feasible accommodation for that job.

Slide 50: I wanted to include these points because often managers and supervisors are hesitant to grant telework because they're concerned the employee is going to be less productive if working remotely than working in the office. But there's an answer to that, and it has nothing to do with what the employee's location might be. Employees should be held to the

same production standards on-site as when working remotely. Managers can require regular accomplishment reports or use other management methods with respect to all employees, regardless of their work location. I know some managers do that through a daily e-mail they expect about what's been accomplished and what remains on the employee's plate. Others do it in different time intervals, but this is -- this is a concern that is on the part of managers and supervisors that I would be -- by no means say is illegitimate, but has to be handled in a different way [than denying telework as a disability accommodation]. And it can be handled by keeping tabs on productivity and performance of all employees, regardless of where their work site location is -- rather than thinking the answer is to deny telework as a reasonable accommodation where it might be in fact required under the ADA.

Finally on slide 50, there's a link to a publication on telework as a reasonable accommodation that EEOC has issued that walks you through what the analysis would be and gives a number of examples. That may be a useful guide if you get requests from employees for telework as an accommodation.

Finally, turning to slide 51 and then we'll do some questions. Here are links to our Enforcement Guidance on Reasonable Accommodation and Undue Hardship. Walks you through everything from what's a reasonable accommodation request? How you request medical information? What legal issues come up with respect to different types of accommodations? And also here is a link to a question-and-answer guide on Promoting Employment of Individuals with Disabilities in the Federal Workforce.

The first half of that publication deals with affirmative hiring tools in the federal government and the second half deals with the accommodation and nondiscrimination issues that we talked about today. Linda?

>> All right, great. I'm going to start with a few questions we have related to telework since that's top of our minds here. The first one is, how long can an employee telework as a reasonable accommodation? Is there a time limitation or restriction?

>> There, the ADA imposes no time limitation on how long an accommodation can or needs to be provided for. Rather, there

may be issues about, for example, a doctor has said for two months an employee is going to need this particular accommodation due to their recuperation from, you know, a mobility-related impairment or the employer might become aware that something that was previously needed is no longer needed, and check in with the employee and/or their physician about whether the telework arrangement previously granted is still needed.

So, as with any accommodation, it'll be no different for telework -- how long the accommodation is provided for would depend on the employee's medical need for it and whether that continues, and for how long, and also, of course, at a certain point due to changed circumstances, for the duration, if it became an undue hardship for the employer.

>> Okay, this one's from a federal employee. The person says, I was teleworking for two years until my new supervisor started. She made everyone come back into the office to work and is making me provide new medical information and reply for my accommodation. Is this legal? So...the, the accommodation -- this person was allowed to telework for two years, now the new supervisor wants to do away with the accommodation. Now the supervisor wants new documentation.

>> Yeah, I mean, it's, it's hard to answer that in, you know, general terms, because sometimes the original medical documentation only covered a certain period of time. Or so much time had gone on that the employer legitimately inquired whether it's still needed because the original documentation didn't indicate it was going to be needed permanently, or the agency didn't grant it on a permanent basis, but rather on a "we'll do it for this certain amount of time, then we're going to revisit it." And ... that could be permissible if the documentation wasn't clear or the doctor didn't know or the employer had some legitimate reason for not granting it on a longer-term basis. So you know, it's very hard to answer the legal question without knowing those facts. As a practical matter, you know, if someone has an impairment that necessitates that accommodation over that period of time, it's possible that they have, it's likely they have had health care provider visits for that impairment during that time and there's sort of readily-available medical documentation that can easily be given as an

update. I'm not addressing whether or not the employer can insist upon it, but one could imagine a lot of scenarios where they may be able to -- but in any event, it may be something, regardless of the law, as a practical matter, the employee can readily provide.

>> Okay, that makes sense. Kind of depends on the situation. One more general question related to telework. Actually several questions came in about this. I know this is kind of a controversial issue and there may not be a definite answer, but...a few questions came in related to what equipment, furniture, et cetera, that employers have to provide while someone teleworks as a reasonable accommodation, specifically mentioned were ergonomic furniture, laptops, printers, computers, things like that.

>> We haven't addressed that in any Commission-issued guidance that I'm aware of. I know that JAN has some materials on their website that touch on all these aspects of telework. Have you addressed that?

>> We, our [JAN] stance is that because it isn't really clear, that I think employers should at least provide the equipment they'd have to provide in the workplace that the person's going to use every day. The whole issue of the chair and the desk and the room and all of that, I think that leans more towards the employee's responsibility, but I really think this is something that most employees don't argue over the furniture in the room and stuff. Most of them really just need the tools that they need to work on a day-to-day basis, like the computer and the telephone hook-up and the, maybe a printer. We try to help them negotiate that and work it out so both parties can be involved in providing something. I just find it's one of those areas that could be confusing. The best approach is for everybody to be reasonable, like any other accommodation and work it out. We don't have a lot on our website about it, but we talk to people on a daily basis about this issue.

>> Right, I mean, if someone, if you are on the [webinar] and you have an unusual situation, you want to give a call, my contact information is on slide 52. The attorneys in my office take calls from employers and employees every day. We cannot

bind the Commission in any particular case, but we're more than happy to point you to the relevant areas of the guidance and see if we can suggest ways that other employers have worked out the type of situation that you're confronting, and talk it through.

So, feel free to reach out, if you do have a situation, we certainly would rather hear from folks before the fact and see if we can provide that proactive technical assistance.

>> We can do the same related to accommodation options and very happy to talk to people about it.

So...let's switch to some other questions, not related to telework.

>> Not related to furniture.

>> Right, I don't know about that, but not telework.

Here's one that kind of comes up a lot. What if an employee is on medication that may affect their ability to work safely. Can the employer ask for an employee to disclose, get a letter from a doctor stating that are no issues, et cetera? What can the employer do if they have safety concerns related to medication?

>> Sure, if an employer has any safety concerns, the ADA standard is that if you have a reasonable belief, based on objective evidence, that the employee may not be able to perform their functions, due to a medical condition, then you're allowed to get supporting medical information to satisfy your concerns. Whether you think they may not be able to do the functions or pose a direct threat to safety -- doing their functions -- if you have reasonable belief that's the case, then you can get the supporting medical information. That may be by asking the employee to bring in information from their own physician, or sending them to a medical exam with your own contract position, about whether or not they are able to operate it safely.

Here's a clear, clear-cut example of a reasonable belief based on objective evidence that they may not be able to perform the function safely. [e.g., see example 5.B., <http://www.eeoc.gov/policy/docs/guidance-inquiries.html#5>], observation of employee dizziness while operating machinery] You can get that supporting medical information about whether they're fit for duty. And obviously, in the course of that, you'd raise what the specific concerns were with the employee

and physician in order to make sure [as a basis for the opinion] you got the physician understood what the functions are, and the circumstances under which they're performed, so they could give you an accurate assessment.

The, the situation also arises where the employee might disclose that they're taking certain medications and that may create this same belief on the part of the employer that they can't do the job or can't do it safely because of side effects that medication, given what the job functions are -- may give rise to the same situation.

>> Great, I think we have time for one more here and as you mentioned earlier, if there's any left, we'll get those out to people later. An employee who is not known to have a disability and is not currently being provided accommodations sustains a non-work-related injury and then requests light duty or restricted duty for six weeks. Is the employer required to provide such accommodations?

>> Okay, so, if, first of all, it doesn't matter for purposes of the ADA whether the injury was on-the-job or off-the-job. Completely irrelevant. The person has potential protections, if -- they have a right to an accommodation if they have a substantially limiting impairment. It doesn't matter how they got it. As far as somebody coming forward and requesting light duty, that's a common way we hear the accommodation request come up. If what's meant by light duty is eliminating an essential function of a job, you never have to do that under the ADA, and we reviewed a bunch of examples of that today. So, since you don't have to remove an essential function, you need to . . . clarify with the employee, what are they asking for? What do they need? And figure out if they are requesting that you remove an essential function, allowing them not to perform it for six weeks. You don't need to do that; however, you do need -- we talked about a lot of examples today -- you do need, as the employer, to look at whether there's an alternative accommodation you can provide. So that may be some accommodation during the six weeks that enables that individual to perform those functions, or they may need reassignment to another position, or that they need leave during these six weeks because there's no other way to accommodate them. Those are some initial thoughts in parsing that through.

I see we are at the end of our time. I want to underscore what Linda said. If there are questions you sent in to her, we'll try to do some written responses that she'll post along with the transcripts and the PowerPoint on the JAN website, at the same place where on askJan.org where you found the PowerPoint today. If there are other questions you sent in or you want to talk through a particular situation, feel free to give me a call. My number is on slide 52.

>> Great, thank you so much, Jeanne, that was really great presentation. A lot of great information you provided. We want to thank everybody for attending today and also, a thank you to Alternative Communication Services for providing our captioning. We hope today's program was useful. It'll be archived and available on our website at Jeanne mentioned, we'll get that out as soon as we can.

If you need additional information about anything we talked about today, let us know. If you want to discuss an accommodation, you're always welcome to contact us here at JAN.

Finally, as mentioned earlier, an evaluation form will automatically pop up in your screen in another window as soon as we're done here. We really do appreciate your feedback, so we hope you'll take just a minute to complete that form. Thanks for attending.

[Presentation concluded at 3:30 p.m. ET].

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