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PROMOTING EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES IN THE FEDERAL WORKFOCE

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>> Hello, everyone, and welcome to the Job Accommodation Network's Annual Federal Employer Winter Webcast Series. Today's program is called "Promoting Employment of Individuals with Disabilities in the Federal Workforce" and features Jo Linda Johnson from the Transportation Security Administration. Before we meet Jo Linda, we need to go over a few housekeeping items.

First, if any of you experience technical difficulties during the webcast, please call us at 800-526-7234 for voice and hit button 5 when the automated system picks up. Or for TTY call 877-781-9403.

Second, this presentation is going to be in question and answer format. So send in your questions at any time during the webcast to our email account which is question@askjan.org. Or you can use our question and answer pod located at the bottom of your screen.

Also on the bottom of your screen you'll notice the file sharepod where you can get today's slides, if needed. And finally, I want to remind you that at the end of the webcast, an evaluation form will automatically pop up on your screen in another window. We really appreciate your feedback so please stay logged on to fill out that evaluation form.

And now I'm going to turn over the program to Beth Loy, who is going to serve as our moderator for today.

>>DR. BETH LOY: Thank you, Linda. And we're lucky today to have Jo Linda Johnson as our guest speaker. Just a couple of things, what we have done today is separate the questions that we have received beforehand into several categories so basically the slides are just an outline for you to follow. There will be a transcript available of everything that we discuss following the webcast. It will take us a couple of days to make that available so you don't have to worry about taking notes or anything like that.

And be sure to send in your questions today while we're answering the questions that came in beforehand.

And we'll get to those, as well. We have an hour and a half today.

So with us, Jo Linda Johnson. Ms. Johnson joined TSA in November of 2013 after almost 13 years in the United States Equal Employment Opportunity Commission. She's considered an expert on civil rights, the Federal sector EEO process, issues of affirmative employment and affirmative action and diversity. During her tenure with the Commission she served in several roles including that of appellate attorney with the Office of Federal Operations, attorney advisor and branch chief for the employment division, special assistant to the Vice Chair of Commission, and the Director of training and outreach. She's pleased to now serve as the director of the Civil Rights Office of TSA.

And there are a couple of things you should know about Jo Linda. First off, I won't tell those.

(Chuckles).

>> BETH LOY: But Jo Linda is very smart and to have an hour and a half with her, I just want to thank her for spending time with our audience for doing this for us. She knows a lot about the issues that she's involved with. She's also very involved in her community. She's a member of the Board of Directors for the Bar Association of the District of Columbia. She's also very involved with the American Bar Association's labor and employment law section she's been around she's got a lot of experience she served as a judicial clerk for the superior court of the state of Connecticut and she received her juris doctor from the George Washington School of Law in Washington D.C. in their undergraduate -- her undergraduate degree is from the University of California in Los Angeles so we're pleased to have her with us today.

Jo Linda.

>> JO LINDA JOHNSON: It's my pleasure, thank you.

>> So let's take a look at some of the questions that were submitted beforehand.

First we're going to start with the section called training in use of equipment. So here is a question we received. We recently hired a visually impaired person as a seasonal employee this is through the normal hiring process through USAJOBS.

The person says normally we select all blind employees through Lions World where they ensure all skills are needed before they are brought on board. The employee was selected through USAJOBS and indicated on his application that he was trained in the use of JAWS talking program. After selection and while in training it became apparent that he didn't know how to use the JAWS program and that he would need training to be able to perform his duties.

Now, since he doesn't know how to use JAWS as he indicated beforehand, is it the employer's responsibility to train him on the use of JAWS or would this fall under the must perform the essential duties of the position aspect of the Rehabilitation Act? Please provide any feedback and/or EEO cases on this matter, Jo Linda.

>> JO LINDA JOHNSON: Okay. Hello, everybody, good afternoon. For those on the East Coast and good morning for those on the West Coast. Before I jump in to answering the questions I do want to apologize in advance I have a little bit of a cold and so my voice is a little scratchy I will hopefully be able to stick through the whole 90 minutes but I warned our hosts at JAN if I launch into a coughing fit they are on and I'm off. So with that said.

So I want to answer the question in a little different order than what was suggested. The first part of it you have an employee that you have hired and they are blind and they need an accommodation is basically the question.

They came to you and they purported to understand how to use JAWS but it became apparent that they didn't. I would suggest a couple of things to the employer. No. 1, I wouldn't make the assumption that the person doesn't know JAWS. JAWS I believe they are on their ninth iteration of the software and so it is quite possible that the person when they said they knew JAWS they meant it and what they meant was they knew JAWS from you know JAWS 1.0 or JAWS 2.0 we are now on the ninth generation of it and with all of the bells and whistles they don't necessarily understand how to navigate that, so I would give the employee the benefit of the doubt on that one.

No. 2, you know, regardless of whether they came to you with the ability to use JAWS or not, the second part of this is I would say to the employer training on voice recognition software, which is what JAWS is really not that complicated. And it doesn't take an extraordinary amount of time. And so if this is a person who is a good fit for the job and they must be because you decided to hire them, I think the investment of a couple of days of time to train them up on the current version of the software that you need them to use to work with your system is a good investment of your time.

The question -- the way the question came in suggests that the employer is not terribly enthusiastic about doing that and I would just suggest to the employer that you alter your way of thinking in terms of the time, money and resources that go into finding a new employee versus the time, money and resources that go into training someone on using JAWS, the scales are tipped heavily in favor of training the employee that you have already spent the time, money and resources to bring on board. So I would simply

do that.

>> Okay. Excellent. Let's move on to the second question. This is also involving training on the use of equipment.

That person says if we provide equipment such as speech recognition as an accommodation, do we have to pay the employee for the time it takes him to learn to use it? He has never used it before so he's starting from scratch. What about his productivity during training. Can we lower his rating on his performance evaluation if he's not as productive this year?

>> JO LINDA JOHNSON: So let me ask the question in a different way to hopefully answer the question.

When an employer brings on a new software suite let's say they upgrade from Microsoft Office 8 to Microsoft Office Excel. Everyone has to learn how to use the new programs they have to spend time getting familiar with the software. In some cases they actually have to attend training classes.

Do employers normally pay for employees to do that on the clock? The answer is yes.

So my question back to the person who sent the question in is why would we treat a person with a disability and their learning how to use a new piece of software any differently than new software that we introduce to the rest of the workforce? If you think about it in those terms, I think the answer becomes abundantly clear that yes we're going to need to give them time to do this and the second part of your question with regard to productivity standards, again, I would use as a comparator the person without a disability in your workforce or the rest of your workforce when you introduce a new program you introduce new software it takes a hit on productivity as people learn how to use it and become acclimated to it. do you lower everyone else's performance standard as a result of that or do you consider that as sort of the small dip as a cost for doing business for that limited period of time and go forward? Whatever your answer is to that is how you could and should treat a person with a disability.

And what I suspect the answer is is that you don't lower a performance rating while people become acclimated to the new the Excel spreadsheets or the new version of word and things like that.

>> Jo Linda we have a follow-up to the first question related to JAWS the person says is there an issue that the candidate falsified their skills during the hiring process in other words they said they knew the skill but didn't.

>> JO LINDA JOHNSON: So there may be an issue. Again, I obviously lean toward giving the person the benefit of the doubt. And I would question whether or not they meant I use the software in Version 2 when you have virus 9 and they look very different so therefore it might appear that I don't know how to use it. But what I really was trying to say is the applicant, I know how to use a version it's just not the one you have. But there may be an issue of falsifying their application. That would be up to the

employer to determine. And really sort of outside the realm of the Rehab Act.

>> Okay. The next section of course is packed with questions related to accommodation issues. First question, is my -- if my employer has CAP to provide accommodations and CAP won't buy something I need, then what? My supervisor doesn't know what to do? Do I have to buy it myself?

>> JO LINDA JOHNSON: So this is a great question. And CAP will tell you this, as well. CAP's inability to supply an accommodation will never serve as a defense for an employer for failing to provide an accommodation to their employee, plain and simple so CAP is a Government program subject to the idiosyncracies of the Government budget process. And there are times when perhaps they might run out of funds and funding for the Fiscal Year and be unable to supply an accommodation. There may be other reasons why they choose not to supply an accommodation and I certainly don't want to speak for CAP but they can provide you with lots of examples and lots of information but regardless of the reason behind why they don't provide an accommodation, it doesn't alleviate an employer's obligation to provide an accommodation to their employer. So the answer is you have to find some other way to get it. And that could mean the employer purchasing the equipment, purchasing the software, whatever it is that we are talking about themselves rather than relying on CAP who may normally do it but in this situation is just not able to. But I want to be very clear to everyone.

And it bears repeating and it bears hearing again. The failure of CAP -- and it's really not a CAP failure. Let me restate that. The inability of CAP to provide an accommodation in any given circumstance will never serve as a defense for an employer to fail to provide an accommodation to their employee.

>> Okay. Next question. We have an employee who has asked to telework full time because of her disability. We told her that according to OPM policy her pay will be cut. She said we can't cut her pay based on the policy because she has to work at home because of her disability. Is this true or can we apply the OPM pay policy no matter why an employee works at home full time?

>> JO LINDA JOHNSON: So I may need the person who sent this question in to send in a follow-up because I am not aware of any OPM policy that says if you telework your pay is cut.

What I suspect they might mean is if I am going to be teleworking from a location that has a different locality pay than the office, if that's what you're getting at, and I'm talking to the person who sent in that question, it is in fact permissible for a locality pay to be changed if a person's duty station changes. If my duty station is the DC area, I get DC area locality. But if I become a permanent teleworker and I'm going to be teleworking from you know the Midwest where the locality pay is much lower then that becomes my permanent duty station then yes my locality will be adjusted. And so the employer is entitled to do that.

But if you're referring to anything else, I'm not familiar with any policy that says that

just because a person teleworks they get less pay.

>> Okay. Next question.

I heard that there are new requirements for accommodating pregnant workers. Does this apply to Federal agencies? If so, what are the new requirements and where can I find more information?

>> JO LINDA JOHNSON: So a couple of things. Last question first. You can find lots of information about the Pregnancy Discrimination Act and protection for pregnant workers on the EEOC's Web site go to www.EEOC.gov and type in pregnancy into the search box and you'll come up with all kinds of great resources and great guidance on pregnancy related issues and protections for pregnant workers.

Now, with regard to accommodations, I am -- I just had a discussion with someone here in my office about using the term accommodations when it comes to pregnancy. Because people misinterpret that as meaning that pregnancy is a disability. A normal pregnancy is not a disability.

And therefore, pregnant employees are not entitled to reasonable accommodation under the Rehab Act.

The only individuals entitled to reasonable accommodation under the Rehab Act are individuals with disabilities.

Now, with that being said, pregnant -- a pregnant woman who is in her third trimester and has a job working as a cashier where she has to stand for eight hours a day may ask her employer for a stool so she can be off of her feet because you know that causes a lot of body strain and things like that and her employer may grant her that. That is what I would refer to as little a accommodation not capital A accommodation and that has more to do with just being a reasonable employer and giving your employees the tools they need to do their best at work. Reasonable accommodation capital A accommodation is about what an employee with a disability is entitled to. I want to separate those two. With regard to whatever requirements you may have heard about, I'm not sure. So if you have more information, please send in a follow-up. But beyond that check the EEOC's Web site.

>> Next question, we want to hire a person who uses a wheelchair. But we need to make some changes to the building we lease.

When we asked the landlord about it, we were told that the landlord won't make the changes so we cannot modify the building, either.

Will we be in violation of the law if we don't hire the person in the wheelchair? What are our options?

>> JO LINDA JOHNSON: So you all are in a tough spot. Because you are going to be in violation of the law if you decide not to hire the person because your office won't accommodate them and the use of their wheelchair. You're making a decision based on disability. And that's a violation of the law. If you are a Federal employer the entity that you need to do with if you are a private or state or -- state or local employer you

may have different entities that you need to deal with. So I'm going to presume from the question that this is from a private employer. If the building that you work in is open to the public, then that building needs to be accessible to members of the public which include individuals with disabilities and there are Accessibility Guidelines that all buildings are required to meet. And they in a sense could be staggered in terms of depending on when the building was built will set the requirements for what standards the building actually has to meet but if you have a person you want to bring on board and the building is not accessible changes do need to be made to that building so you guys you the employer are probably going to need some assistance in dealing with the landlord. You can contact the Access Board and that's www.access-board.gov I'm going to drop the www for all of the future Web sites that I give out. I assume everybody knows that.

And so it's access-board.gov. Reach out to the Access Board and they can assist you with getting in touch with the right entity to move your landlord in the correct direction because the fact is unfortunately for you as an employer the failure of your landlord to do what's right will not serve as a defense for you violating the law so you'll have to force your landlord to do what is required of them under the law.

>> I would imagine if it is a Federal entity Access Board will refer them over to GSA.

>> JO LINDA JOHNSON: Yes.

>> All right. Next question. We have an employee who is nearing retirement. She has multiple medical issues and misses a lot of work. When we approached her about her attendance she asked for some flexibility. Until she retires next year. We would like to give her the flexibility she needs. But her not being at work is putting a strain on our department. Are we allowed to terminate so close to retirement?

>> JO LINDA JOHNSON: So if I could restate the question, it's really about are you allowed to terminate someone who is missing a lot of work. The fact that she's close to retirement is not really relevant under the law. The issue is just whether or not you are permitted under the law to terminate her for missing work.

And this is a very complicated question. It's a much more complicated issue than the question would suggest so because of that I'm going to give you some general guidelines but please hear me clearly they are general guidelines and you'll need to get some specific advice from your agency Council on how to move forward the general guidelines are this, attendance is not necessarily considered an essential function of employment. I can hear all of the other managers out there saying outloud and possibly yelling outloud what do you mean it's not an essential function. I understand your frustration but the Commission has determined it's not an essential function of the position. I'm talking -- if I'm talking to a private employer it will actually depend on what circuit you're in because different circuits have made a different decision and they have determined that attendance is an essential function but if your a Federal employer the Commission's guidance it's not an essential function and the Commission hopes you

will work with the employee to figure out the best way to meet your needs as an employer and their needs as an employee. So what that might mean you would certainly be well within your rights whether you're on the public side or private side is to have a conversation with the employee about the fact that they are not perhaps meeting the performance requirements of the position and because of that, you want to consider reassignment to another position that they are better qualified for. As they near retirement. As I was talking another option popped into my head which is maybe having a discussion -- and there's nothing wrong with having an open and honest dialogue with your employee about your concerns.

Maybe you know sort of discussing with them the fact that their missing work is putting a strain on the office and asking, is there another accommodation that might work for them. Because maybe the answer might be more telework for this employee. And the strain might be in you know getting ready for work or commuting to work or any number of things associated with coming into the office itself. And so it's maybe the -- if maybe the option of more telework were made available to the person it might decrease the absenteeism I'm not sure I don't know what the exact circumstances are but the broad answer I want to give you is No. 1 there's no harm in having an open and honest dialogue with your employees. I would suggest doing that. I know employers often will shy away from sort of bringing up their concerns. There's nothing wrong with doing so. So I would encourage you to do that.

No. 2 if you're a private employer the advice might be a little different than if you're a Federal employer. If you're a Federal employer I'm going to need you to work with an employee to figure something out if you're a private employer you may have different options available to you. But above all, please talk with your Agency Council about the way forward before you make any moves.

>> Okay. Next question. One of our employees has been diagnosed with sleep apnea. And now he says he can't work overtime on weekends. Do we have to excuse him from overtime? We require all our security guards to rotate through the weekends.

>> JO LINDA JOHNSON: So of course it's hard to know without having the person who asked this question on the line with us to supply some background information. Some information that I would want to know would include what exactly were the medical -- the limitations that the medical documentation suggested that the person has now. Sleep apnea doesn't necessarily just occur on the weekends.

So I need to understand more about what the medical documentation said. And what the limitations are for this employee that's based on their sleep apnea that the employer is expected to accommodate.

It could be that the person -- and this often happens with sleep related disorders it could be that the person needs to have a more routine schedule so that they can have a more routine sleep schedule. If the employer can accommodate that while also working in some overtime, then you might be able to meet your needs as an employer while also

meeting their needs as an employee so I would need more information and I would guess maybe the employer needs more information to figure this out before I can give an answer.

>> Next question, there is an employee with disabilities who is not performing his job functions. We gave him a package to start the reasonable accommodation process in February. But he has not turned it in. How can we pursue the reasonable accommodation process with this employee? He has threatened filing a complaint because he doesn't feel that he should have to complete the paperwork because his disability is obvious.

>> JO LINDA JOHNSON: Wow. So a couple of things. Let me start with the first sentence of that question. There's an employee with a disability who is not performing their job functions and let ne just say a few words about this before I move on to the second part.

For all of the supervisors and managers who are listening on the call, what I would say to you is easily 8 out of 10 times a reasonable accommodation conversation is initiated by you. Not by the employee. And it will often start with you as a manager or supervisor observing a performance issue or observing a conduct issue. So let's say I'm the employee and I start turning in work late. I do it two or three times and you call me in and say okay Jo Linda you have blown three deadlines, what's the problem. That's often you as the manager just don't know it yet because what I'm about to say oh the reason why I've been missing deadlines is because I was recently diagnosed with X fill in the blank and it's causing my concentration to be severely impacted and because I'm having difficulty concentrating I'm having difficulty getting my work done in the same timeframe that I used to. I'm going to need some different deadlines. I've just put you on notice that I have a medical condition and I have a need for an accommodation so what you thought was a performance conversation really turned into an accommodation conversation and that genuinely happens 8 out of 10 times when it's an accommodation conversation it is initiated by you as managers and supervisors.

So I say all of that to say that managers and supervisors need to be proactive about performance deficiencies the minute you take note of them you need to have a conversation with your employee. Because if in fact the performance problem is the result of an accommodation need, you want to know that as soon as possible so that you can provide the accommodation that they need and get them back on track. If it's not an accommodation issue you still want to nip it in the bud as quickly as possible so the employees know what their -- what your expectations are and they can perform to those expectations so that's Part 1 of this question.

The second part of the question really goes to the issue of what does an employee have to do to put an employer on notice that they are a person with a disability and they have a need for accommodation.

So No. 1. An employee doesn't have to put anything in writing. It is enough for me

to say verbally that I have a disability and a need for an accommodation.

That is enough to put the agency on notice. That's not the same thing as giving you everything you need but that's certainly enough to start the accommodation process the Interactive Process.

So if I tell you hey, my back is killing me. The office chair I have is terrible and my back is killing me that's another to initiate an accommodation conversation now what happens after that will depend on lots of different factors.

So the issue of notice is No. 1. And if the employee has an obvious disability, then the employer is on notice and I'm not sure what the disability is in this situation but I'll use an easy one. If an employee uses a wheelchair because of a disability, that is obvious and so as an employer you wouldn't need medical documentation to support their need of an accommodation for accessibility because their need is obvious the disability itself is obvious but in my example my back is killing me because it's a terrible chair you can't necessarily look at me and tell I have a back condition.

So I may need to provide you with documentation to support that. But the agency is on notice that they need to engage with me the minute I verbally told you the fact I haven't put something in writing is irrelevant certainly doesn't alleviate your obligation to participate in the process but I have an obligation as an employee to participate in the process so if you for example if I tell you I have a back condition and I need a better chair and you ask me for medical documentation that explains exactly what I need in a chair and I refuse to provide it, then I've failed to engage in the Interactive Process and the employer would be well within their rights to not move forward until I give them the information that they need. But if I give you the medical documentation explaining exactly what kind of chair I need and exactly what my back condition is but I fail to fill out your agency form, no, that wouldn't be a good reason for the employer to fail to move forward.

So the question is really sort of divided between notice, when is the employer an notice and that's as soon as the employer becomes aware and how you become aware is not scripted out. It's not prescriptive. It doesn't required it to be in writing. And then the second part of the question is about moving forward with the Interactive Process. You need medical information? Do you need something from the employee? So I would go back to the employee and be very clear about what it is you need. If you need medical documentation, fine. Ask you know -- you're entitled to ask for it if the disability is not obvious or the need for the accommodation is not obvious if I'm a person in a wheelchair my condition is obvious but perhaps if I'm asking for a specific type of accommodation, it may not be obvious to you that that is associated with my condition.

So you may need some further medical documentation it just depends on the individual situation but if what you have given the employee is sort of the standard employer form requesting a reasonable accommodation and the employee has already done that verbally or they do have a condition that makes the condition obvious as well

as the need obvious, the employee is right, they don't need to do anything else.

>> And Jo Linda we have a couple of follow-up questions on this section.

>> JO LINDA JOHNSON: Okay.

>> Before we move on to the next one.

This person just offered some comments related to that last scenario. She says the Interactive Process is more important than filling out paperwork, especially since the disability is obvious. If paperwork is part of the process, I would offer to engage in the process with the employee, fill out any forms together if the form is to request help.

>> JO LINDA JOHNSON: I would agree with those comments.

>> I thought those were good comments to add.

Let's see here.

When did EEOC's position change from regular and reliable attendance being an essential job function?

>> JO LINDA JOHNSON: I'm not aware of EEOC ever changing their position. As far as I'm aware it's always been their position.

>> Here is another question. What if an employee has an obvious disability and the employer takes six months to grant the accommodation to be able to use a wheelchair at a desk? Wow.

>> JO LINDA JOHNSON: So the employee uses a wheelchair and they have asked for a different desk so that they can functionally use their desk and the employer takes six months to supply the desk.

>> That's the way I would read that question, too.

>> JO LINDA JOHNSON: Wow I would say that's a long time. There may be extenuating circumstances that I'm not aware of so I want to give the employer the benefit of the doubt that they were diligently working during that six months to get the employee what they needed.

What I would say sort of taking it out of that specific example and just broadening it to the big picture question of what happens if the accommodation takes some time, the answer is the employers and employees need to work together to perhaps come up with interim accommodations.

So if the very special desk that I need is on back order and it's going to take six months is there something that can be done in the interim? And this will happen when it comes to sometimes chairs certainly if we have to do some office reorging or not reorg but office building changes you know if I have to widen a door, if I have to widen a passageway, facility updates don't happen overnight.

So I might need to work in a different space. I might need to telework. Any number of interim accommodations can be put in place when the needed accommodation can't happen you know in a very quick turn-around time.

>> Okay. Let's see here. We have a couple of questions about medical exams. I thought I might throw them in here because we did mention medical documentation.

>> JO LINDA JOHNSON: Okay.

>> Can we require that an employee seek a medical exam in order to provide the agency with potential accommodations?

>> JO LINDA JOHNSON: Beth can I ask you to read that question again because I had a coughing fit.

>>DR. BETH LOY: Can we require that an employee seek a medical exam in order to provide the agency with potential accommodations?

>> JO LINDA JOHNSON: If the agency needs medical documentation to support the employee's need for an accommodation, it's perfectly acceptable for the agency to ask for it, absolutely. I'm reading a little bit into this question and maybe that's not what the question Erin end-to-end. But just in case it is what the questioner intended if what you're really asking as an employer the employee has given me medical documentation but it's not enough, it doesn't give me enough information to determine what kind of accommodation they need and I want to send them back to the doctor, can I do that? The answer is yes, you can. You can also ask the employee for permission to contact the doctor yourself and that way you can have a conversation about these are the duties of the job. What can the employees do or not do. The employee may or may not be comfort with you making that direct -- comfortable making that direct contact ask their permission the other thing is to send the doctor a questionnaire of the specific information you're missing that you might need and send it through the employee and ask them to get it filled out because it may not require a second appointment but really for the doctor to take ten minutes to fill that out.

>>DR. BETH LOY: Another follow-up on that, how many times would you recommend an employer continue to reach out to an employee for medical documentation if they refuse to respond.

>> JO LINDA JOHNSON: If the employee refuses to respond?

>>DR. BETH LOY: I believe so, yes.

>> JO LINDA JOHNSON: So often what I have seen in my experience where an employee is refusing to respond is that the employee believes that the employer has enough information to make a decision on.

And so what I find happens in a lot of those situations is really a breakdown of communication. So the employer needs to call the employee in. Hopefully the employer has a reasonable accommodation coordinator or a Disability Program Manager or someone who serves in that capacity who can help facilitate this conversation with the manager because your average manager is not well versed in the Rehab Act or the ADA. And they don't necessarily need to be if they don't do this on a regular basis so someone who does do it on a regular basis should be part of this conversation to sit down and explain to the employee, listen, here is what we need to understand in order to make this decision. This is what we are missing. And this is what we still need from you. And you as an employee, in order to get the

accommodation you need, you must provide us that information and failure to do so will result in you not getting the accommodation you need.

I think if you sort of have that frank but open conversation with the employee and explain why you're asking for what you're asking, why you need it, and that you're moving towards trying to help them, you just need more information in order to make the right decision that usually will clear things up.

But ultimately if an employee fails to engage in the Interactive Process the obligation is on both parties if the employee flatout refuses then the employer is well within their rights to not provide an accommodation. You don't have to guess. You don't have to you know come up with solutions on your own. The employee needs to participate in the process.

But again, I want employers out there to always keep in their mind the perspective of the employee. The employee is likely thinking you have enough. So explain to them why you think you don't. And work through that together.

>>DR. BETH LOY: Jo Linda one more follow-up related to the wheelchair at the desk to kind of close this topic out. There were no modifications of the desk. This person was forced to transfer into an uncomfortable chair that caused great pain while being put on hold for six months to actually improve -- to actually prove that she could use the wheelchair at the desk.

>> JO LINDA JOHNSON: Okay. So can you tell from the email address if it's Federal versus private.

>>DR. BETH LOY: It's Federal.

>> JO LINDA JOHNSON: So if it's Federal that's a problem ultimately so the EEOC has said very clearly that a failure to act in a reasonable amount of time in and of itself in granting or denying a request for reasonable accommodations can be a violation of a person's rights under the Rehab Act. The use of a wheelchair at a desk I'm frankly unclear as to why an employee would need anyone's permission to use their wheelchair at a desk. But if it's because it wouldn't fit and they needed some modifications to the desk, requiring an employee to work in pain for six months is going to be a problem absolutely so I would encourage that person if they have already gotten the issue resolved and they have the desk that they need, great. Then we can all move forward. But if they still don't have what they need I would encourage them to reach out to their disability program office a reasonable accommodation coordinator and/or their EEO office to see if they can get those things to move along.

>>DR. BETH LOY: I would say if it were a private employer a very similar process would apply you would go through your internal process and then if you can't seem to get it worked out in a timely manner you have to go to the Equal Employment Opportunity Commission.

>> JO LINDA JOHNSON: Your local office absolutely.

>>DR. BETH LOY: We'll move on to Schedule A questions. Is there a definition of

targeted disabilities for Schedule A?

>> JO LINDA JOHNSON: So just as a headsup to everybody, I am chewing on a cough drop to prevent another coughing fit so I apologize if my voice is a little garbled.

>>DR. BETH LOY: You're a trooper. I know what you're going through because I've been there.

>> JO LINDA JOHNSON: So back to the question. Is there a definition of targeted disabilities. Part 1 of the question. The answer to that is yes and you can find that on a thousand different Web sites go to EEOC.gov type in targeted disabilities in the search box and you'll come up with a list of the nine targeted disabilities but the full question is is there a definition of targeted disabilities for Schedule A? Schedule A has nothing to do with targeted disabilities. Schedule A is for people with disabilities. Period. Targeted disabilities that category of disabilities exists only for data collection purposes it's not for any other purpose. People often will get these confused and they think only people with targeted disabilities can use the Schedule A hiring authority and that is completely inaccurate.

Schedule A is available to individuals with severe mental or physical disabilities and that could absolutely extend beyond the nine targeted disabilities.

The nine targeted disabilities was identified in 1979 by a group of agencies as the nine disabilities that we would collect data on for reporting purposes. The reason for that is because the world of disability is obvious infinite and we can't collect data on every type of disability so there were nine disabilities that were identified and nine categories and those nine you can find in a thousand different reports. On EEOC's Web site as well as most Federal agency Web sites.

But for Schedule A, Schedule A is a Hiring Authority for People with Disabilities. And so agencies don't need to limit that to people with targeted disabilities.

>>DR. BETH LOY: Can we use Schedule A to hire someone with a history of a back condition?

>> JO LINDA JOHNSON: The question suggests that the person doesn't currently that back condition if they don't currently have a disability that's really not the person that Schedule A was meant to assist.

The public policy behind Schedule A is really to encourage the hiring, the advancement, and the retention of people with disabilities. Because we know that they are the most unemployed group in this country.

The unemployment rate for people with disabilities according to the census is roughly 50% and for people with severe disabilities it goes up to 80%. That's an astronomical number when you think about the national unemployment rate being closer to depending on your state or if we're going to look at it nationwide it's closer to 7%.

So Schedule A was really meant to address this big picture problem that has been with this country for 40 years now of the underemployment of people with disabilities.

A person who used to have a condition but doesn't anymore doesn't really fall into that category. Now all of that being said, I approach and obviously this is just my opinion and each employer should do what they think is best. But I approach Schedule A with an eye towards inclusiveness and with a goal of bringing more individuals with disabilities on board. So a Federal employer who uses its hiring authority is free to be as inclusive as they want in deciding for themselves who meets the definition of a person who is eligible for Schedule A appointments.

>>DR. BETH LOY: And another Schedule A question, a couple more in here.

>> JO LINDA JOHNSON: Okay.

>>DR. BETH LOY: Is there a legitimate requirement for Schedule A candidate to provide amplifying disability information? In other words, physical, intellectual, psychiatric codes alongside of a Schedule A letter in order for an agency to extend a tentative offer for Federal employment.

>> JO LINDA JOHNSON: So I think what's meant by that term, amplifying information, is -- and the person should write back in if I'm misinterpreting this but I think what you're asking is can an employer require you to fill out the SF256 the answer is yes they can that is a condition of employment with a Schedule A appointment.

The filling out of that form, however, comes with the offer. It shouldn't come before the offer. What comes before the offer is legitimately a requirement that you prove that you're a person with a disability because that's who is eligible under Schedule A. So I think that's what they are asking.

If they are not, let me know.

>>DR. BETH LOY: Okay. Next question related to Schedule A, I heard some people have Schedule A issues. And some -- some Federal jobs reject applicants who are deaf or hard of hearing. They are frustrated because Federal agency companies won't accept Schedule A.

>> JO LINDA JOHNSON: So a couple of things I guess. No. 1, schedule is not a -- Schedule A is not a requirement so that means I as a Federal employer a Federal hiring manager, I get to make a decision. I have a choice. Do I want to hire someone under Schedule A or do I want to go through the typical competitive process? When I was with the Commission I spent a great deal of time encouraging employers, encouraging Federal employers and individual hiring managers and supervisors to make the choice to use Schedule A. But it is a choice. It's not a requirement.

So that's Part 1. And I know that is frustrating to the disability community. They want it to be a requirement.

Certainly I share that frustration but that doesn't change our reality currently which is it is a choice and not a requirement.

Part 2 of that question what I heard you say Beth correct me if I'm wrong is they are employers who might screen a person out because they have a hearing impairment so if the job requires that the person be able to hear, and you are a person who is deaf

then that is a legitimate -- and inherent in my statement I'm assuming that's a legitimate job qualification to the particular position then that might mean that that job is not open to somebody who is hearing impaired or entirely deaf. There's nothing necessarily illegal about that and what I would suggest to people from employers -- for employers to think about, another way to think about it is there's lots of job requirements that screen people out. And not all of them are illegal.

So if you think about it from the perspective of if I'm going to be hiring an accountant, I want somebody who is a CPA who has passed the CPA exam. That's a job requirement that I have set. That will screen out lots of people who have accounting degrees but can't pass the CPA exam. But it doesn't necessarily make it illegal just because I'm screening people out.

So if I've decided that the requirements of the job actually necessitate that the person has passed the CPA exam, then that's a legitimate screenout factor.

Other factors might include you know -- we can use the obvious examples like a firefighter, someone who is a firefighter cannot be vision impaired based on the job. They need to be able to see what they are doing, see where they are going, in order to fight fires and so save people so that's going to screen out people with visual impairment. That's not illegal.

So it -- the qualification standard that is screening individuals out needs to be legitimate. Job related and consistent with business necessity. And if it is, then it's perfectly legitimate. If it's not, that's when it becomes a problem. And I think sometimes there's an assumption that any factor that screens anybody out is illegal. And that's just simply not true.

>>DR. BETH LOY: One more kind of a summary question related to Schedule A. The argument among disability employment advocates is that Schedule A is not used enough in employing people with targeted disabilities. It's also been argued that Schedule A is cumbersome but I think EEOC is going to change the process. Thoughts on this?

>> JO LINDA JOHNSON: So a couple of things. I don't disagree with the statement that it's not used often enough. I couldn't disagree more. That's why I've spent five years of my career dedicated to encouraging the use of it more frequently for Federal employers.

That's being said, it doesn't -- our desire to see it used more doesn't change the reality that it's not -- it's still not a requirement.

The second part of that statement that EEOC might be changing the requirements, please note that it's not EEOC's regulation. It's OPM's regulation. So if any changes were to be made and lots of changes actually have been made over the last ten years with Schedule A, those changes would be made by OPM.

EEOC works very closely with OPM to encourage the use of Schedule A but Schedule A is a regulation that's promulgated through OPM.

>>DR. BETH LOY: Okay. Let's go ahead and move on here. Job descriptions. And then we'll come back to some more questions that were submitted today. Do you have any guidance or resources about how to determine essential job functions and rate compliant job descriptions?

>> JO LINDA JOHNSON: Okay. Let's start with -- excuse me; let's start with how to think about essential job functions, the best way for me to think about it, I think about why did you hire the person you hired? If you take a job in your current office, what was it about that person that met the needs of the job? So if I have a data entry clerk position that I want to hire for, what am I hiring that person to do? What do I really need them to do? The answer is I need them to do data entry.

Now, the data entry clerk might also serve as the backup receptionist. They might also serve as the person who receives packages, and signs for them. They might also serve as any number of other duties as assigned type functions. But what you really hired them to do was type. Was to do data entry so you needed somebody who knew the software and knew how to type and someone who was accurate those are the essential job functions. The things that were added after afterwards are those other duties as assigned. That's what helps me to think about what are the essential job functions versus the other duties as assigned.

Unfortunately I can't offer you a very clear matrix of what falls into essential versus what doesn't because it really comes down to individual employers deciding for themselves you know what is essential to the job and what's not but I offer sort of how I think about it to help in clarifying in someone else's mind how to think about it.

The second part of the question, remind me again, please.

>>DR. BETH LOY: The second part was how can we write compliant job descriptions?

>> JO LINDA JOHNSON: Ah, okay. So I think the best way to make sure your job descriptions are not unintentionally screening out individuals who might otherwise be able to do the job is to think about the functions of the job and not how they were actually done.

So what I mean by that is let's say you are hiring a data entry clerk. Let's stick with that same example we talked about the fact what you needed was somebody who could input data and understood the software very clearly but what you might be tempted to pit into a job description is somebody who has great typing skills and can type 90 words a minute with accuracy.

But what if I know the software very well and I can navigate the software but I use -- I use Dragon Naturally Speaking voice recognition software to do it I don't actually type because I have a mobility impairment. Well the best way to convey that in a job description is someone who knows the software who can navigate it well and can input data at X speed whatever speed it is that you need as opposed to how you do the job which would be typing 90 words a minute.

I hope that sort of answers the question in terms of writing job descriptions. Think about the job in terms of what you need done and not how someone used to do it. Because just because the person who has been on the job for the last ten years did it via typing doesn't mean that's the only way to do it.

>>DR. BETH LOY: I think this next question will be a good example of that. The person says we require our clerical staff to have valid driver's licenses because they have to sometimes run office errands for supplies. One of the staff told us she is having seizures and won't be able to drive. We are thinking it's an essential function for her to be able to drive. Sometimes she's the only one available to run office errands. Can we reassign her on this basis?

>> JO LINDA JOHNSON: So what I would say to that employer, that's a great example of whether or not something is an essential job function or not. What I would say to that employer is you need to be very sure that running errands is in fact an essential job function. And that's up for you to determine. It's not something that you know I can sit back and Monday morning quarterback for you.

What I would say to you is, is that what you hired the person to do? Is it absolutely essential to that job? You know you have explained that sometimes there's no one else who can do it. I would ask -- if I were in your position I would ask these questions to myself No. 1 when there's no one else to do it and she's not available what do you do in these situations can the errands wait do they have to be done at a certain time if they have to be done at a certain time and she's the only person available that might make it essential if it's the type of thing that for convenience sake we always do it at 2 p.m. but if it had to wait until 4 when someone else came on board it wouldn't be a big deal that might suggest it's not essential so there are a lot of questions to sort of go through to determine whether or not it's actually required.

>>DR. BETH LOY: We just got another question in that I think has a good example embedded in it. The person says if we hired an individual because we were not aware of their profound hearing loss, they could read lips, but have now become aware they are profoundly deaf and being able to understand verbal directions is an essential function because they are a certified nursing assistant and most respond to alarms, cause for help, -- calls for help, et cetera, can we terminate the employee at this time.

>> JO LINDA JOHNSON: If it's an employee not an applicant, before you terminate them, what you need to consider is whether or not there's another position they can be reassigned to that they are qualified for. Reassignment is considered the accommodation of last resort. If there is no accommodation that would allow the person to stay in their current position which the way you have described it, I would suggest that hearing is probably an essential function of this position then we need to consider if there's another vacant funded position for which they are qualified if there is such a position we need to consider reassignment if there is not then you might be within your rights to move to termination.

>>DR. BETH LOY: What would be the cutoff here, Jo Linda, if an employer wanted to say well the person was never qualified for the position to begin with?

>> JO LINDA JOHNSON: In terms of time? I am trying to think about any cases that have actually dealt with that aspect of time. That's a good question. I'm not sure I know the answer to that Beth.

>>DR. BETH LOY: I don't. We have Linda on the time, too. Linda, do you know?

>> LINDA BATISTE: No I think the EEOC guidance on similar issues if they never were actually qualified then you can kind of treat them as an applicant but if they worked for a while and then you realize they are not qualified then you probably should treat them as an employee and I think the safe approach is exactly what Jo Linda said go ahead and look at whether you have a vacancy I think that's all around the better approach.

>> JO LINDA JOHNSON: It does become tough because it's exactly what you said, Linda, if they performed for a while, what is a while? I don't know the person who sent in that example, that's a great example of you know we can all imagine sort of an emergency room scenario where you have nurse practitioners and doctors yelling orders back and forth. If everyone is wearing face masks you don't get to read lips so you do actually have to be able to respond to verbal cues in that sort of emergent environment so I can definitely see that being an essential function. But if the person has been successfully doing that job for three months and it only now occurred to the employer or now was discovered by the employer that the person is reading lips, I don't know. That's a tough question. I agree. I think the best approach is to treat them as an employee and look for reassignment first.

>>DR. BETH LOY: Okay. And let's move on to some general questions here and then I can go ahead and throw the ones that we have had submitted out after we get through these.

Let's see.

It's been said by reasonable accommodation professionals that at least 80% of the U.S. workforce can claim a disability under the ADA-AA. Let's assume that 80% of the workforce get a Schedule A letter.

Do you see the competitive process becoming obsolete? Or that the Schedule A process becomes the normal way to apply for jobs?

>> JO LINDA JOHNSON: So I don't see the get the processes becoming obsolete because Schedule A is just not -- as we discussed earlier, just not all that frequently used. It's certainly not as frequently used as the disability community would hope I'm trying to recall the last statistics I heard from OPM on the use of Schedule A for new hires I think the number was less than 10% so the workforce being 80% potentially people with disabilities notwithstanding that doesn't change the fact that employers are not using Schedule A extensively. So I don't see that being phased out.

>>DR. BETH LOY: Next question, I'm having trouble getting my employer to

provide my accommodation and I'm starting to feel like they want to get rid of me. What is the reality of the complaint process? If I file a complaint, I'm I pretty much guaranteed to lose my job?

>> JO LINDA JOHNSON: Federal or private?

>>DR. BETH LOY: This is Federal.

>> JO LINDA JOHNSON: In the Federal complaint process, if you -- I can go through it extensively but it would be easier if you just went to EEOC's Web site EEOC.gov and type in complaint process and they outline the Federal complaint process very extensively on the Web site it starts with you contacting the EEOC counselor and initiating an informal complaint. During the informal process they will try to resolve it. If that doesn't happen you can move to the formal complaint process and then there are lots of steps after that.

Filing a complaint, no, it is not a guarantee that you're going to lose your job. Sometimes there are things going on in the background. You know, earlier during our call I was suggesting to employers that they give employees the benefit of the doubt. I need employees to do the same thing. And give employers the benefit of the doubt. So what you perceive as being a delay, an unreasonable delay may be because you don't have all of the information.

There may be actual legitimate and reasonable reasons why there has been a delay but unfortunately the employer hasn't conveyed that to you.

So on both sides I think we all need to give each other the benefit of the doubt that everyone is working to do the right thing.

And you know, your priority is not necessarily my priority. And so it may be taking a little bit longer because I have two other things that are in front of that process, two other accommodation requests I'm working on before I get to yours. That being said if you do feel like you've given the employer every reasonable opportunity to fill the request and they are not giving you any information as to why they are not filling the request, then the complaint process is obviously an option. The complaint process is -- when you contact an EEO counselor they can explain the full process to you as well as the information that you'll find on the EEOC's Web site.

For the private sector, the process is a little bit different. Some private employers often will have their own internal process. But you can also go to a local EEOC office for Federal employers obviously there's an EEO office within all Federal agencies that you would reach out to.

>>DR. BETH LOY: Next question, what changes have you seen relating to an aging workforce that includes you and me, by the way.

>> JO LINDA JOHNSON: Yeah, thanks for that. I appreciate that. (Chuckles).

>> JO LINDA JOHNSON: What I've noticed is I don't bounce back from colds nearly as quickly as I used to.

(Chuckles).

>> JO LINDA JOHNSON: What I -- CAP actually has a lot of information on the aging workforce. And so it would be -- it would behoove anyone who is interested to go to CAP.mil and check out their various PowerPoints and various annual reports over the years because they talk about as the workforce ages more and more people become individuals with disabilities. I think it's sort of an accepted fact that as people age, they acquire disabilities. We acquire diseases that render us a person with a disability.

We have accidents that render us a person with a disability. So you know it is something that happens. And as a result, employers need to be well versed on how to supply employees with the tools that they need to get the job done. And that always look like it used to look. You know how an employee did a job 30 years ago is not going to look like how an employee does it today and probably won't look like how an employee does it ten years from now and we all need to be open minded and flexible to allow for those changes.

And if we are, that will allow for innovation. And it will also allow you know room for individuals with disabilities.

>>DR. BETH LOY: One of the things I tend to use this as an example when I'm doing presentations talking about aging issues one of the great things about Facebook is I can't communicate with some of the co-workers who are here in the next hallway in the Facebook and we never will see each other through the entire day but if they have a question they need to ask they will find a way to text me, send me an email or private message me. They can always find me. So one of my aging issues would be I probably never get up from my desk.

>> JO LINDA JOHNSON: You know Beth that's not good for you need to get a sit-stand desk.

>>DR. BETH LOY: Yeah that's for sure.

Next question, what are the most frequent accommodations for employment testing?

>> JO LINDA JOHNSON: Employment testing? So I would need more information before I can give you any answers. It depends on the tests. It depends the class of job we're talking about.

>> STUDENT: We do have a station on our Web site under our A to Z by topic that has a whole section on testing accommodations. So hopefully that will help the individual. We have a GAO publication we have our publication. We have a publication from the PACER Center.

Okay. So the questions that we had submitted today, is there a time limit for when reasonable accommodations have to be furnished to a person with a disability is it 30 days, 20 days, please advise.

>> JO LINDA JOHNSON: If the question came in from the Federal employer -- employee, all Federal employers are required to have reasonable accommodation

procedures or a policy. Each agency gets to determine for themselves what their timeframe will be based on the business of their agency and what works within their agency.

So if you are a Federal employee, you need to look to your own agency's policies. And procedures. To determine what is that timeframe that the agency should be held to. The one caveat I'll add to that is using my own agency as an example, we have procedures and we have a timeline within those procedures that dictate how soon a manager has to forward the request, when a response to the request has to be provided to the employee.

But in providing the response to the employee that's not the same thing as providing the accommodation so if an employee asked for a piece of software, a piece of equipment, a new chair, a sit-stand desk as I just mentioned, whatever the case may be, the response may be yes we have ordered that but the manufacturer of that equipment has said it's on back old and -- back order it will be three months before we can get it to you so that three months is outside of our guidelines for providing but it's also out of our control so what we're trying to -- required to do is respond in a timely manner and as I mentioned earlier perhaps put in an interim accommodation until the final accommodation can be acquired.

>>DR. BETH LOY: Next question, when should reassignment be used as a reasonable accommodation?

>> JO LINDA JOHNSON: So reassignment is called the accommodation of last resort because it should be used last. That means we have tried everything else. To accommodate a person in their current position. And there's nothing that is going to work out.

I would allow them to stay on the job. That's when you consider reassignment. I can't give you a timeframe because sometimes that happens in a split second, you know, if a person is in a catastrophic accident and they have injuries such that they will never be able to perform X jobs again that decision can be made very quickly. But more often than not, a person will have a condition that degenerates over time.

And so if I am diagnosed with MS, what I can do this year will look different than what I can do next year which will look different than what I can do three years from now.

So if there were maybe different accommodations along the way until we get to a point where I can no longer perform the essential functions of this job and then we look to reassignment. So there's no exact timeframe. It's the needs of the employee at that time.

>>DR. BETH LOY: The next question is if you don't have a reassignment?

>> JO LINDA JOHNSON: I'm sorry; Beth, can you repeat that.

>>DR. BETH LOY: Sure what do you do if you don't have a reassignment that's open? You probably do in the Federal Government but I guess there are probably

situations where you don't.

>> JO LINDA JOHNSON: I mean there could be a situation where there's no vacant funded position that's available for which the employee is qualified. You know I do have to be qualified for the job so if you reach that stage where you've searched and there are no jobs or you have searched and there are jobs but the employee is not qualified for them, then you've reached the end of the reasonable accommodation process. Unfortunately. And that discharges the employer's duty to the employee to reconsider the assignment then you can look to termination of employment.

But I guess what I would suggest is if you reach that stage, please make sure that that -- those conversations are being held in concert with your counsel's office, in concert with your labor relations or employee relations whatever it's called in your office because you know if we reach a point where there's no accommodation that would allow me to stay on the job and there's nothing else for me to do, I might be a person who is eligible for disability retirement.

>>DR. BETH LOY: Okay. Next question, we have an employee who exhausted her FMLA and they requested an additional six months off of work as an accommodation. Her working unit has supplied Human Resources with a convincing undue hardship argument. We accommodated the employee with an additional three months off of work and she indicated that she would not return after three months. Could we terminate her at the end of three months?

>> JO LINDA JOHNSON: So let -- that's a great question. Thank you to whoever sent it in because it touches on a lot of important issues. Issue No. 1, leave is considered a reasonable accommodation. Period.

No. 2, the FMLA is a leave entitlement statute, not necessarily for people with disabilities but for caring for someone else in my family, for having a child, for adopting a child, or potentially for my own serious health issue.

Because employers often get this confused, they associate the time limits that are affiliated with the FMLA as time limits affiliated with leave as a reasonable accommodation. And that is a mistake.

There's nothing in EEOC policy or guidance that says you only get 12 weeks of leave as a reasonable accommodation.

You get 12 weeks of leave for the FMLA. But if I need six months of leave as a reasonable accommodation, then that's what I need as a person with a disability. The FMLA notwithstanding.

So we really need to understand that there is a distinction.

Part 2 of that relates to undue hardship. Let's say I am a person who needs six months of leave as a reasonable accommodation.

What the employer is expected to consider is whether or not they can grant that, either you know paid leave if I have the leave, unpaid leave if I don't.

Perhaps advanced leave if the employer has a policy of typically advancing leave in

situations like mine.

Then it's something they should consider for me.

But if the employer wants to make the argument that granting these six months of leave would be an undue hardship, they need to prove that it's an undue hardship for the employer as a whole, not an individual work -- so not an individual office not an individual region, not an individual in my case airport. But it has to be an undue hardship for the entire organization.

And this is where most employers will not be successful.

The proof that it's going to be difficult for one individual office or one individual office unit does not equate with being very difficult -- a significant difficulty or expense for the employer, which is what is required under the law. So employers need to be very clear about that. However, there are certainly situations where extended leave would be an undue hardship for an employer if the employee holds a position that's a specialized position. If it's -- this certainly happens with small businesses. If I'm you know a shop of 20 people, someone being out for six months is probably going to be an undue hardship for that employer. If I'm the Federal Government, the microagencies notwithstanding, someone be out for six months is going to be difficult. It is going to be tedious. It's going to be you know a challenge to try to address. But it is not going to amount to an undue hardship.

>>DR. BETH LOY: Next question. An employee has requested that no employee use hair or clothing -- whose hair or clothing has been exposed to tobacco smoke come within ten feet of him at the workplace I don't know how it would be possible to keep other employees more than ten feet away throughout the workday. We have offered the employee telework. But he does not want to telework. What are your thoughts on this request?

>> JO LINDA JOHNSON: I agree with the employer, I don't know how you would implement that accommodation.

That specific accommodation. I think if I were the manager in this situation, I would sit down with the employee to -- and I would probably pick up the phone and call JAN and ask them to join the conversation to talk about alternatives. Because it's nearly impossible to prevent other employees -- rather it's nearly impossible to prescribe the movement of other employees with regard to one employee.

You know, you might be able to put them in a space and put a sign outside of their space that says, you know, if you smoke or if you come into contact with people who smoke, please send me an email rather than coming to my office because I have an allergy. You might be able to provide a person with an air filter for their work space. I'm not sure. But I agree with the employer their specific request is going to be difficult so we'll have to come up with some other creative options. And I know from experience that Beth and Linda and their colleagues at JAN are much more creative than I am in coming up with solutions in situations like this.

>>DR. BETH LOY: We would certainly like to think so wouldn't we Linda.

>> LINDA BATISTE: Yeah but you came up with some good ones.

>>DR. BETH LOY: I was saying my goodness that's good.

>> JO LINDA JOHNSON: Beyond that I really do think for the employer it's going to be difficult and I guess to that point I do want employers to understand when it comes to accommodation, the goal behind accommodations is to give the employee the tool they need to do the job our job as managers and supervisors to supply those tools and let the employee do the job but it has to work both ways it has to work for the employer just as much as it works for the employee. So when it comes to making a definitive decision on what an accommodation will be, what the accommodation is that we will put in place, the final decision is the employer.

Because it has to work for your business.

I do want employers to think proactively about are we doing the best things for our employees and are we giving them the tools that they need and are we setting our own biases aside. I do want you to do all of those things. But I do certainly keep in mind that businesses still need to run.

>>DR. BETH LOY: Next question. If an employer removes essential functions as a accommodation for a specific employee and is no longer is able to accommodate the employee due to business necessity will the decision not to accommodate be negatively looked at by the EEOC because the employee had been accommodated up to a certain point with the remove of these essential functions?

>> JO LINDA JOHNSON: I'm going to infer from that question that you remove -- you were moved from essential functions and then the employee's condition dissolved and now they are not even able to perform even at the level that you changed their job to.

And if that's the case, I think what you're asking is if -- have you put yourself on difficult ground by removing essential functions in the first place and the answer is generally speaking, no, the Commission has said you don't have to remove essential functions as an accommodation but you decided to there's nothing that says you can't there's a minimum not a maximum in terms of what you can do so the fact that you did just means you went above and beyond but if the employee's condition has rendered them unable to perform at whatever level you have set as acceptable, then you're just back at the same place of considering are there any other accommodations that we can make. If there are not, then we consider reassignment as the accommodation of last resort and if there's a vacant funded position for which they qualify, reassign them. If there's not, then you have discharged your duty.

>>DR. BETH LOY: Next question, if an employer says an accommodation is effective and the employee with the disability says it is not, who makes the final decision?

>> JO LINDA JOHNSON: So that's a good question. Effectiveness is important.

The easy answer to that question is the employer makes the final decision on accommodation. But the reality is the accommodations need to be effective. Otherwise you haven't met the needs of the employee.

So if you have an employee who is telling you that the accommodation you put into place is not effective, you need to engage -- further engage in the Interactive Process with them to figure out exactly why it's not effective.

What is missing that they really need?

You know, I use the chair example because it's save -- it's easy to illustrate this point.

If I tell you I have a back condition and I need a better chair for my back condition and you as my employer tell me that you need medical documentation to support that and I say, okay, here it is. And the medical documentation dictates that this has to be a chair that's sized for a person who is 5'9" or taller it has to be sized for a person who has arms that are 33 inches or longer.

It has to have you know adjusting arms that go out and in as well as up and down it has to have adjustable lumbar support and has to have an adjustable headrest. Well, I may have limited your world of available chairs from 4 million potential chairs down to two. Based on all of those factors.

And the reality is, you get to choose between those two but it has to be one of those two and not the world of 4 million chairs.

And sometimes a person's limitations will be so extensive that the accommodation comes down from a million different options down to one. If that's the only thing that's effective, then in fact that is the thing that they get.

>>DR. BETH LOY: Okay. Next question, what recommendations do you have for an employer who has an employee that is unfortunately trying to use a reasonable accommodation process to try to move out of his or her job? If they are able to perform it with or without accommodation, we're trying to obtain a more flexible work schedule beyond what's provided as an accommodation when it's truly not needed?

>> JO LINDA JOHNSON: So I go back to my answer to the previous question which is the final decision maker on providing accommodations is the employer. So if I come forward as an employee and I tell you that I have X condition it impacts me in these ways and I have these limitations and we come up through the Interactive Process collectively an accommodation, that meets all of the functional limitations then that's what you as an employer can stick with. If I can't demonstrate that the accommodation isn't effective beyond I just don't like it that's just tough as an employee it's not about liking it it's about effectiveness so my recommendation to employers to keep themselves out of these sticky situations is to have very frank very open dialogue with employees from the very beginning of the process. Then throughout the process. When there are delays communicate with the employee when you have concerns communicate with the employee when you have concerns that the employee is trying to

gain the system communicate that you have concerns that the employee is asking for something that they are not entitled to and that you believe that as the employer you've given them everything they are entitled to maybe the employee is doing that but the reasons behind them are legitimate maybe they have work-life concerns that frankly you want to know about as an employer the more open and frank the dialogue, the more everyone can get everything out that needs to be out on the table.

>>DR. BETH LOY: Okay. Next question, we have an individual currently enrolled in the state vocational rehab services. An individual currently enrolled in rehab services who is recently hired at a military hospital. We have been informed by the military installation that he will not be allowed a job coach or any stabilization services how does military installation differ from other Federal agencies in reasonable accommodation?

>> JO LINDA JOHNSON: If he is being hired into a civilian position then the answer is they don't differ at all. We obviously have military employers who have military Service Members and then we have the various departments, Department of Navy, Department of Army who also employees hundreds of thousands of civilians. So in -- so in their capacity as a civilian employer they are subject to these laws just like any other employer when we are talking about the uniform services, it's different so I'm presuming with this person being hired into a civilian position in which case they are entitled to reasonable accommodations absent an undue hardship. So if the hospital that they are being hired into, that employer as a whole can demonstrate why having a job coach or any other stabilization services on board for that person when they come on board as an undue hardship then great make the argument I suspect they won't be able to make that argument especially however when it comes to job coaches and other stabilization services the resistance is typically personal. And it's typically based on fears, myths and stereotypes and not based on actual fact and actual undue hardship and that's what the law requires.

>>DR. BETH LOY: Okay. Next question. The person says you mentioned that employers need to determine undue hardship based on the entire organization rather than an individual working. We are an organization of 6,000 employees with 7 statewide facilities and 6 divisions in central office.

Are you saying it would be next to impossible to say that an employee's request for an additional three months would cause an undue hardship this employee is a Subject Matter Expert and serves as a lead in the work unit.

>> JO LINDA JOHNSON: So I'm not saying it would be impossible. Because I don't know all the details of you as an employer. You've given us some details. But I would ask a lot more questions about you all do. What this person does. You suggest they are a Subject Matter Expert. Are they the only one? If they are, you might actually have legitimate argument that it is an undue hardship for that person to continue to be out of work. But in order to make that argument, you have to demonstrate how it's impacting business operations for the employer not for their individual office where they

are located.

So I'm not saying it's impossible. I'm saying that undue hardship is a very high hurdle to get over. And it's purposefully high. The public policy behind the Rehab Act the public policy behind the ADA is for individuals with disabilities who are able to work to be able to work.

And to have the employers to work with them to make that happen.

Sometimes that means I need time off to recover so I can come back and be completely functional at work.

So understanding what is behind it I think helps employers who understand what we mean when we talk about undue hardship it is a high hurdle to get over it is not impossible I have definitely seen employers make arguments of undue hardship but it's not meant to be easy there's a reason why.

>>DR. BETH LOY: And I think that's a good one to end on Jo Linda, we have a couple of questions in here relating to accommodations and I think it will take a bit of discussion. I encourage people to contact JAN directly with those questions. I can think of a Subject Matter Experts offhand who these can go to. So please do that. Tell them Linda sent you.

(Chuckles).

>>DR. BETH LOY: And Jo Linda, you made it.

>> JO LINDA JOHNSON: I did make it. I put you on hold a couple of times. You didn't know it.

>>DR. BETH LOY: That's okay. That's okay. We appreciate you taking the time to do it. And that is all the time that we have today. Wow, that went quick. Thank you for attending and thank you, also, to Alternative Communication Services for providing the net captioning. And of course a special thank you to you, Jo Linda, we really appreciate it.

>> JO LINDA JOHNSON: It was my pleasure thank you so much for having me and thank you to everyone who participated for all of the good questions, I really do enjoy the dialogue.

>>DR. BETH LOY: And if you need additional information about anything that we talked about today, please let us know. And again if you want to discuss an accommodation please feel free to contact us. We hope the program was useful and join us for our next Federal Winter Webcast Series and we also have one of our general webcasts coming up in March. And I'm sure the weather will be just as lousy as what it is today.

(Chuckles).

>>DR. BETH LOY: Hopefully it will break by the March one.

And we'll go from there.

And finally, as we mentioned earlier, an evaluation form will automatically pop up on your screen in another window that is if you don't have your popups blocked if you do

you'll receive it at a later date so when we're finished here you should see that we do appreciate your feedback. We take that feedback, people will ask for Q&A session and we were happy that Jo Linda could help us out for that. We appreciate your feedback so we hope you'll take a minute to complete the form, and again, thanks for attending. This concludes today's webcast.

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