



# **JAN Webcast Series 2021**

## **ADA and Accommodation Lessons Learned: COVID-19 Edition**

**Teri Weber, Senior Vice President, Spring Consulting Group**  
**Tracie DeFreitas, Principal Consultant, ADA Specialist, JAN**



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## ADA and Accommodation Lessons Learned: COVID-19 Edition

- **Applying Title I of the Americans with Disabilities Act (ADA)**
- **Engaging in the Interactive Process**
- **COVID-19 Specific Accommodation Topics**
- **Resources**



## Federal landscape is expansive and complex:

- ADA
- Rehabilitation Act
- Family and Medical Leave Act (FMLA) and Families First Coronavirus Response Act (FFCRA) [expired]
- Pregnancy Discrimination Act (PDA)
- Age Discrimination in Employment Act (ADEA)
- Title VII, Civil Rights Act
- Genetic Information Nondiscrimination Act (GINA)
- Occupational Safety and Health Administration (OSHA) standards, directives, and guidance
- Centers for Disease Control and Prevention (CDC) guidance and orders

## **Lessons Learned: Applying Title I of the Americans with Disabilities Act (ADA) Engaging in the Interactive Process**





## Lessons Learned – Compliance

- Compliance can be complex – *a practical, flexible approach to the IP can be constructive*
- Federal law covers a wide landscape – *check the boxes to determine which law(s) applies*
  - ✓ What is the basis for the *accommodation* request?
- Some states have issued laws, mandates, and standards that can impact the ADA interactive process – *may need to adapt the process to comply*

## When is the ADA triggered?

- An applicant or employee requests a change at work for a *medical/disability-related* reason
- Engage in the interactive process (IP)
- Determine if the individual has an ADA disability:
  - Has, or has a record of, a medical impairment that puts them at high risk for developing serious illness from COVID-19, if infected
  - Has an underlying medical impairment that is exacerbated by the effects of having had COVID-19
  - Has an underlying medical impairment that is exacerbated by circumstances related to COVID-19



## Lessons Learned – Procedures

- Avoid mishaps in processing accommodation requests – *designate personnel and avoid silos*
- Interactive accommodation process did not change because of COVID-19 – *circumstances might inform future IP and leave policies and procedures*



Engaging in the Interactive Process During the COVID-19 Pandemic



Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19



## Lessons Learned – Flexibility

- Flexible work arrangement policies/practices might support modifications without triggering ADA
  - ✓ Is the individual requesting a modification that a policy or practice already allows for other workers?
  - ✓ Don't treat workers with disabilities disparately
  - ✓ Don't ask for medical information if not determined to be a request for "accommodation" under the ADA



Workplace Flexibility, the ADA, and Requesting Medical Information





## Lessons Learned – Medical Inquiries

- Rules related to requesting medical information for ADA purposes still apply – *might need to adapt the interactive process according to changing circumstances*
  - ✓ May ask an employee medical questions or request documentation when impairment and/or need for accommodation is not obvious or already known
  - ✓ May choose to forgo or shorten the exchange of information
- ★ What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws



## Lessons Learned – Temporary Accommodations

- Add temporary/trial accommodations to your playbook
  - ✓ Document as temporary/trial
  - ✓ May choose to place an end date on the accommodation to suit changing circumstances based on public health directives
  - ✓ Extension might be necessary
- ★ What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws



## Lessons Learned – Job Restructuring

- Temporarily excusing performance of one or more essential functions does not mean the employer permanently changed a job's essential functions
  - ✓ Not *required* to remove essential functions but can
  - ✓ Choosing to excuse essential functions during a pandemic does not obligate an employer to refrain from restoring essential duties when it chooses



What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

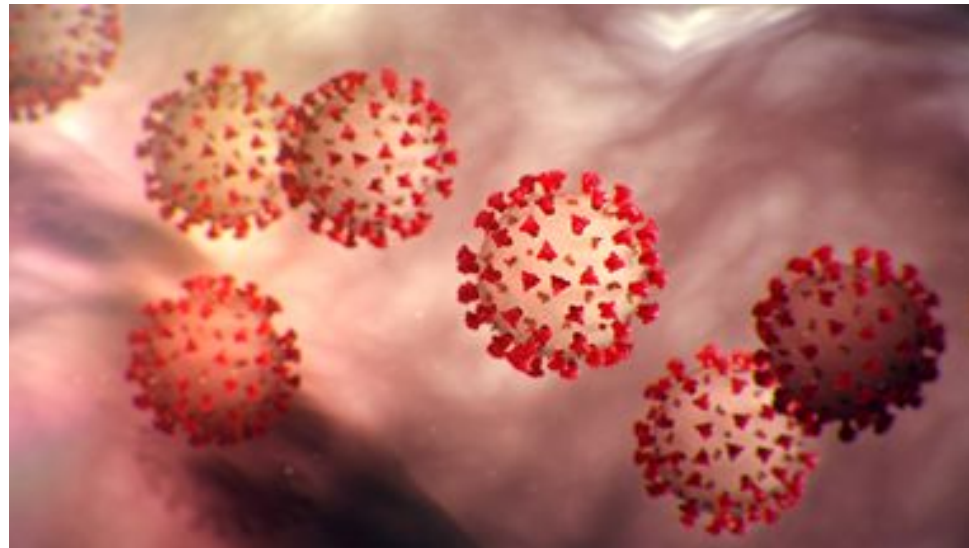
# Tips for Engaging in the IP

## Know the 5 W's and the H:

- **What** accommodation is being requested?
- **Why** is it being requested?
- **Who** is requesting accommodation?
- **Where** is the accommodation needed?
- **When** will the accommodation begin and end?
- **How** will the accommodation solve the issue of performing the essential job duties/meeting performance standards?



## Lessons Learned: COVID-19 Specific Accommodation Topics



## Where is the accommodation needed?

- Understand where the job-related barrier exists:
  - At home or other location
  - At the workplace or other location
  - During the commute to/from work

## How will the accommodation solve a work-related issue?

- Should enable the performance of essential job duties
- COVID-19: *Work safely and/or perform duties in a different way in response to the pandemic situation*

## Commonly requested COVID-19 related adjustments/changes:

- Telework
- Equipment to telework
- Job restructuring  
(e.g., removing job functions)
- Personal protective equipment (PPE)
- Policy modification  
(e.g., mask/face covering policy, vaccination)
- Schedule modification  
(e.g., reduced or alternative hours)
- Leave



## Lessons Learned – Returning to Work

- While strategies might reduce the risk of exposure to COVID-19, not one size fits all – *some employees might require different strategies*
- Remember that state requirements related to return to work can impact the ADA interactive process – *may need to adapt the process to comply*



Strategies for Returning to Work During the COVID-19 Pandemic





## Lessons Learned – Masks

- Masks and face coverings can be mandated in the workplace – *reasonable accommodation might be needed when a mask can't be worn for a medical reason*
  - ✓ Explore alternative, effective means for stopping the spread of the virus
  - ✓ May request medical information when *job-related and consistent with business necessity* under the ADA
  - ✓ Some state mandates can impact the interactive process
- ★ Masks for COVID-19 Management and ADA Accommodations



## Lessons Learned – Telework

- Telework is not automatically required as an ADA accommodation when employees are recalled to the workplace – *engage in IP and assess case-by-case*
- Telework required or allowed during the pandemic might impact the future of remote work as an accommodation – *could serve as a trial period to determine effectiveness of working at home*



What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws



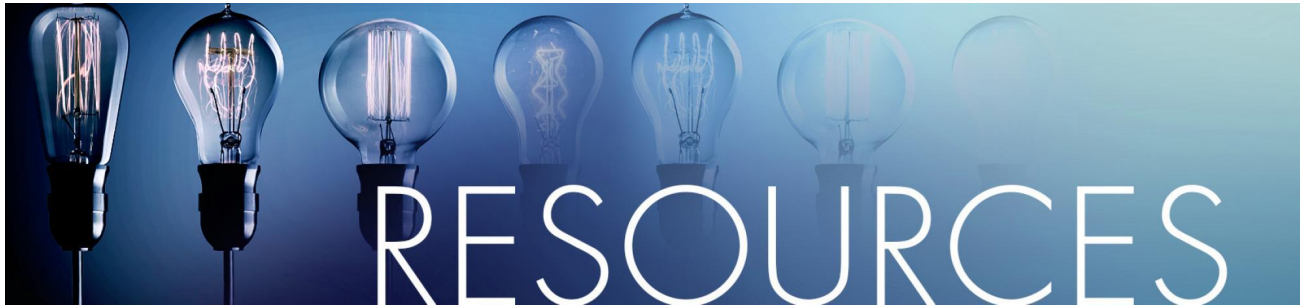
## Lessons Learned – Leave

- When there are no accommodations to keep an employee working, leave can be a form of accommodation, if reasonable – *indefinite leave is not considered reasonable under the ADA (EEOC)*
  - ✓ Apply internal leave policies and applicable federal and state leave laws first
  - ✓ If ADA is the path, request duration, consider incremental approval, and evaluate undue hardship
- ★ Employer-Provided Leave and the ADA



## Lessons Learned – COVID-19 Vaccine

- Mere availability of vaccine does not automatically remove responsibility to provide accommodations when needed for a *disability-related reason* under the ADA
  - ✓ Keep an open mind, do qualification standard/direct threat analysis, and use the interactive process to gather objective information about continuing reasonable accommodation
  - ✓ May ask questions about whether the vaccine may alter the need for reasonable accommodation – *but might still need reasonable accommodation*
  - ✓ Avoid making accommodation decisions based on ‘COVID fatigue’
- ★ What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws



- **JAN - Employers' Practical Guide to Reasonable Accommodation Under the ADA**  
<https://AskJAN.org/publications/employers/employers-guide.cfm>
- **JAN - Interactive Process**  
<https://AskJAN.org/topics/interactive.cfm>
- **JAN - Recognizing an Accommodation Request**  
<https://AskJAN.org/articles/Recognizing-an-Accommodation-Request-Under-the-ADA.cfm>
- **JAN - Sample Forms**  
<https://AskJAN.org/topics/Sample-Forms.cfm>

- **JAN - Coronavirus Disease 2019 (COVID-19)**  
<https://AskJAN.org/topics/COVID-19.cfm>
- **JAN - Engaging in the Interactive Process During the COVID-19 Pandemic**  
<https://AskJAN.org/articles/Engaging-in-the-Interactive-Process-During-the-COVID-19-Pandemic.cfm>
- **JAN - Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19**  
<https://AskJAN.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm>

# Resources

- **JAN - Providing Temporary or Trial Accommodation Solutions**  
<https://AskJAN.org/topics/Temporary-Accommodations.cfm>
- **JAN - Workplace Flexibility, the ADA, and Requesting Medical Information**  
<https://AskJAN.org/articles/Workplace-Flexibility-the-ADA-and-Requesting-Medical-Information.cfm>
- **JAN - Make Telework Work**  
<https://AskJAN.org/articles/Make-Telework-Work.cfm>
- **JAN - Coronavirus (COVID-19), Stress, and Mental Health Conditions**  
<https://AskJAN.org/blogs/jan/2020/03/coronavirus-covid-19-stress-and-mental-health-conditions.cfm>



- **JAN - Accommodation Strategies for Returning to Work During the COVID-19 Pandemic**  
<https://AskJAN.org/blogs/jan/2020/08/accommodation-strategies-for-returning-to-work-during-the-covid-19-pandemic.cfm>
- **JAN - Masks for COVID-19 Management and ADA Accommodations**  
<https://AskJAN.org/articles/Masks-for-COVID-19-Management-and-ADA-Accommodations.cfm>
- **EARN - COVID-19 and Job Applicants and Employees with Disabilities: Emerging Practices to Employ and Protect Workers**  
[https://askearn.org/wp-content/uploads/2020/08/EARN\\_2020\\_Covid19-PolicyBrief.pdf](https://askearn.org/wp-content/uploads/2020/08/EARN_2020_Covid19-PolicyBrief.pdf)

# Resources

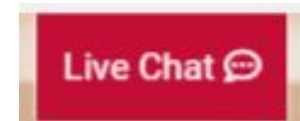
- **EEOC - What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws**  
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- **EEOC - Pandemic Preparedness in the Workplace and the ADA**  
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- **EEOC - COVID-19 “Ask the EEOC” Webinar**  
<https://www.youtube.com/watch?v=i8bHOtOFFJU>  
**Accompanying transcript**  
<https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>

# Resources

- **EEOC - Reasonable Accommodation and Undue Hardship Under the ADA**  
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>
- **EEOC - Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA**  
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>
- **EEOC - Employer-Provided Leave and the ADA**  
<https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>

# Questions? Ask JAN!

- Visit **AskJAN.org**
- Submit a **JAN on Demand** question @ [AskJAN.org/JANonDemand.cfm](http://AskJAN.org/JANonDemand.cfm)
- **Email JAN** @ [jan@AskJAN.org](mailto:jan@AskJAN.org)
- Use the **JAN Live Chat** button @ [AskJAN.org](http://AskJAN.org)
- **Call:**
  - 800.526.7234 (V)
  - 877.781.9403 (TTY)
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