



TRANSCRIPT

Advancing Equal Employment Opportunities and Creating Inclusive Workplaces

Part 3: The Americans with Disabilities Act (ADA), Employment and Disclosure

July 23, 2019 from 2:30 – 4:00 pm [Eastern Time]

>> **Pam Williamson:** Hello, and welcome to everyone. I am Pam Williamson, the assistant director of the Southeast ADA Center, and a board member of Georgia APSE. The Southeast ADA Center, a project of the Burton Blatt Institute at Syracuse University, Georgia APSE, and WISE are partnering to bring you an eight-part webinar series, "Advancing Employment -- Equal Employment Opportunities and

Creating Inclusive Workplaces." Thank you for joining us today for the third webinar, "The Americans with Disabilities Act, Employment and Disclosure." We have almost 300 people online with us today, and I hope that we have more by the time we get rocking and rolling here.

The goal of this series is to build awareness of Employment First. The series will feature a variety of topics for supported employment providers, vocational rehabilitation professionals, self-advocates, and family. Each webinar embraces APSE's vision, mission, and values, and provides tools and resources that can be used to advanced equal employment opportunities for people with disabilities.

I would like to again thank National APSE, the Association for People Supporting Employment First, for their support of this series. APSE is the voice of Employment First Movement, and a leader in advancing equal employment opportunities for people with disabilities in the workplace. They have provided guidance, speakers, and promoted the series. For those of you who are APSE members, you already know that you are part of a great organization. If you are not an APSE member, I encourage you to join us, so that you can take advantage of all that APSE has to offer. You may learn more about APSE membership at apse.org.

Today, I'd like to introduce the speakers for the webinar. I will be presenting for this webinar, along with my colleague, Barry Whaley, who is the project director for the Southeast ADA Center. Barry and I are both very passionate about seeing people with disabilities succeed in the workforce. We bring a wealth of combined experiences.

Prior to serving as the director of the Southeast ADA Center, Barry was the executive director of Community Employment Incorporated, a nonprofit supported-employment provider that focused exclusively on providing integrated, competitive, and customized employment, and self-employment opportunities for people with significant disabilities. He was also a founding board member and past president of Kentucky APSE.

Personally, I have worked with the Southeast ADA Center for 20 years, providing guidance and training on the Americans with Disabilities Act. Specifically, I worked -- enjoyed working with employers and employees with disabilities to promote the inclusion of people with disabilities in the workplace. I've always tried to practice what I preach by encouraging all individuals to maximize his or her potential in the workforce.

Today, Barry and I will share about the Americans with Disabilities Act. So at this time, Barry, I'm going to turn it over to you to get us started in discussing the Americans with Disabilities Act and disclosure.

>> **Barry Whaley:** Great. Thank you, Pam. I appreciate it. Marsha [assumed spelling], if you would go back to -- two slides back, at this point, if you would, please. One more back. There we go. All right, thank you. So as Pam said, my name is Barry Whaley. I have about 23, 24 years of experience in finding work for people, and as she said, I'm founding board member of APSE. I have been the state chapter president. So I have a long history -- Kentucky was one of the first APSE chapters chartered with the organization. So when I went to do this training on ADA Title I, disclosure, accommodation, because I feel it's very important, and I think it's important for two reasons.

The first is, I get the sense in all my years of doing this that, often, employment professionals don't have a clear understanding of what the law said, and what protections are afforded people that we are looking for work for. And I often start these presentations by telling a quick story. I was in a meeting a few years ago, and there was a lady sitting in front of me who was a supported employment professional. And she was talking about a young lady that she had gotten a job for, and the young lady was having a great deal of difficulty on the job. And

as I'm listening to the story, I'm thinking about all the accommodations that could have been put into place for this lady to be successful. It was a clearly a job that she loved. It was a clearly a job that she was qualified for. So at the end of her discussion, I'm waiting for the punch line, right? I'm waiting for the shoe to drop. What accommodation did you put in place for this lady to be successful? And the response was, "Oh, no, we just had her quit her job." So it's a very frustrating thing, and that happens, I think, far too often in our line of work, because we don't understand the protections of ADA Title I. We also don't understand what our responsibilities are, both our responsibilities as well as the people we represent. So, Marsha, if you would go to slide four, we'll start into this discussion.

And I want to begin with a commercial that the Southeast ADA Center, the ADA National Network -- we are funded by NIDILRR. That's National Institute on Disability, Independent Living, and Rehabilitation Research. We are part of the Administration of Community Living, Health and Human Services. This is where our funding comes from. So my commercial is, should you end up in court someday, and you say, "Barry Whaley said," or "Pam Williamson said this," you probably will not be successful in court. We only can provide informal guidance on the law. We do not offer legal opinions. In addition to providing technical guidance, we also provide training, like we are today, written and

electronic material on the law, as well as research. So, Marsha, if you could go to slide number six, please.

So I think one of the first issues with the ADA, and some of the confusion is, sometimes people believe that the Americans with Disabilities Act provides preferential treatment for people with disabilities, and that simply isn't the case. The Americans with Disabilities Act is a very powerful civil rights law. It continues the legacy of Section 504 of the Rehab Act. It continues the legacy of the Civil Rights Act of 1964 -- guarantees equal treatment for people with disabilities, as well as people who have an association with people who may have disabilities. So again, this provides equal opportunity, equal treatment. This isn't preferential in any way, but it levels the playing field so that people can go as far as their skills, and their dreams, and their aspirations can take them. Marsha, slide seven, please.

So often, when, you know, the general public thinks about the ADA, what is their general perception? And often, the mind goes to Title III of the ADA. This is -- Title III is kind of the immediate impact. It's where the law actually touches people on any given day. And so, Title III are the places of public accommodation and commercial facilities. Can you get in the door of the store or restaurant? Can you use the facilities? Can you access goods and services? Can you engage in consumerism, or

going out to eat, or going to a movie, or going to a sporting event just like anybody else? So again, we see that theme of equal opportunity here in ADA Title III, and as I said, this is the immediate impact. This is where people see the ADA in action most often -- you know, crossing the street for instance, curb cuts, or automatic door openers, those kind of universal design things that benefit all of us, not just people who have disabilities. But really, there are five titles to the Americans with Disabilities Act. Today, we're going to be talking about Title I, and Title I are the employment protections. These are the protections that are provided to workers who have disabilities, so that they can work in a work environment, and demonstrate their competency, and their ability any given day. Title II -- these are the public entities and transportation. So these are state government, local government, transportation systems, if you have people who benefit -- people who benefit from paratransit system, for instance, that might be under Title II. Title III, we've already talked about. Title IV are telecommunications, and that would include TTY, TDD, video relay -- and relay systems. You know -- so -- and we understand that, when you consider the ADA was first passed in 1990, then amended in 2008, we couldn't have foreseen, 29 years ago, the way that we communicate today being far different than the way we communicated in 1990, right? Who imagined that that device that you have in your pocket would allow you to text message?

So certainly, the way we communicate has changed, but sometimes, phone calls are the most important way we communicate. And so, how we communicate if we have hearing impairment, for instance, would come under Title IV of the ADA. And then, Title V are the technical provisions, and we're not going to discuss those today. So, Marsha, if you would go to slide eight, please.

So each month, I look at a couple of different websites. One of them in particular is ODEP. We -- oops, we had a slide go away. If we could go back -- thank you. I look at the Office of Disability Employment Policy website, and I take a look at kind of -- you know, this is the month-to-month how are we doing. So there are two issues I want to discuss here, and the first is unemployment rate. And often, there's a lot of confusion. What is the employment rate for people with disabilities versus people who do not identify as having disabilities? So this is -- these are brand-new figures. They are from the month of June 2019. 3.7% of people without disabilities are unemployed, but then look up above that. People with disabilities -- the unemployment rate is 7.7%. So we can see that the unemployment rate for people with disabilities is a little more than double that for people who do not identify as having disabilities. We've seen some recent fluctuation. For instance, I think either in the month of May or April, the unemployment rate for people without disabilities had dropped to 3.2%. So we're seeing a bit

of an uptick here, but the message is that people with disabilities are more than double that of people who do not have disabilities in being unemployed. Now, those numbers even become more critical for minority groups in particular. So I was talking with a gentleman earlier today from a Hispanic chamber of commerce, where the unemployment rate for young people with disabilities who are Hispanic was 9.4% in June 2019. I have a message to adjust my mike, and I got to tell you, Pam, I have it about as close to my face as I could be. Is this any better?

>> **Pam Williamson:** It's okay for me. So, folks -- hopefully, folks will be able to hear you better.

>> **Barry Whaley:** Yeah. Yep. I have it about as close to my mouth as I could be.

>> **Pam Williamson:** Excellent. Thanks.

>> **Barry Whaley:** Yep. Okay. So the unemployment rate only gives us a small snapshot of the picture, right? A larger indicator of how we are doing economically is workforce participation. So if you look at these numbers on the right of this slide, you can see that people who do not identify as having a disability -- 69.1% of the population are actively looking for work, or are in the labor force in some way. Take a look at

that number above. 20.9 -- only 20.9% of people with disabilities are actively engaged in the labor force, or are looking for work. so if we reverse that number, we could say that 79%, roughly -- 79.1% of people who identify as having significant disabilities are on the economic sidelines. They're not even looking for work. So that's why the work we do is critical, and that's why it's important that we have these discussions around Employment First, and around the ADA, and issues of how do we improve outcomes for people with significant disabilities. Slide number nine, please, Marsha.

So here's the basic, all right? So ADA Title I says that employers cannot discriminate against people who have disabilities in regard to any employment practice or term, the conditions of employment, the privileges of employment. And that covers all aspects of the employment process. For instance, before someone ever walks in the door for a job interview, for instance, he or she may ask for an accommodation. Let's say somebody might have some difficulty in the interview, and may need someone to perhaps reframe questions, so that they are more understandable. That's an accommodation, right? Maybe it -- maybe you're looking for a job somewhere where there is computerized pre-testing, so -- and maybe someone is unfamiliar with how to use this type of testing. Or maybe they have some difficulty with translating written word into -- in a way they can understand. So,

then, someone may need to accompany that person to the pre-testing. So -- and who's likely to do that, right? Well, most often or not, it's going to be a supported-employment professional. So one thing -- if you take nothing else away from our discussion today, what you need to know is, under ADA Title I, under the law, your presence as a job coach, if you are fulfilling a function that levels the playing field for somebody -- then you are an accommodation. So you, in fact, are a protection under ADA Title I, because your work is as an accommodation for that individual. Slide number 10, please, Marsha.

So does the ADA apply to everybody? Well, no, not everybody. So -- and here are some exemptions to ADA Title I. So if you are a private employer, and you have fewer than 15 employees, then you are exempt from ADA Title I. Interestingly, the federal government, the executive branch of government, is exempt from Title I. And often, when I give this presentation in person, you know, people say, "Oh, my gosh, how can the federal government be exempt?" Well, they may be exempt from the ADA, but they have responsibilities under 504 of the Rehab Act. So it's under 504, which is the foundational law that led to the ADA. Under 504, the federal government has obligations and responsibilities. So they're not totally off the hook. Corporations that are fully owned by the U.S. government -- so for instance, FDIC, the Federal Deposit Insurance Corporation, is a corporation fully owned by

the U.S. government, and would be exempt from ADA Title I. Private membership clubs are exempt, and I have to tell you, this is a very high bar. Because you have to look closely at the exclusivity of somebody joining that membership club. So if there are, in fact, restrictions to membership, then they may have exemption under ADA Title I, but again, you have to look at how restrictive that membership is. U.S. government agency -- executive agencies are exempt. The 500-and-something Indian nations in the United States -- the Indian nations are exempt. And finally, if it is a business operating in a foreign country -- let's say you work for IBM or something, and you're working in China, or Japan, or something. If compliance with ADA would violate a foreign law, then that might lead to an exemption. So it's important to keep in mind, because we're talking here about exemptions to ADA Title I. These do not apply to, say, ADA Title III. Remember, those are places of public accommodations, access to goods and services. So although there may be exemptions under Title I for these groups, those exemptions don't apply to state -- or to privately -- private organizations, businesses, and such. Next slide, please, Marsha.

So there are three things that are in red on this page, and these are the things that stand out. So we're talking now about what is a qualified applicant under ADA Title I, and what the law says is an employer can't discriminate against a qualified applicant based on -- or on the basis of

disability. So who's a qualified applicant? That's somebody who meets the skills, the education, the ability to perform the essential functions of a job, and can perform those essential functions of the job with or without a reasonable accommodation. So the three key things here are being a qualified applicant -- that you can do the job, that you can perform those essential functions of the job, and that you can perform the essential functions of the job with or without a reasonable accommodation. It's right there on most applications we fill out for and with people, right? It says "Can you perform the essential functions of the job with or without a reasonable accommodation?" That's exactly why you see that on the application sheet. Slide 12, Marsha.

So anytime that we change a work environment so that it levels the playing field and provides equality for someone who has a disability, we are in fact providing a reasonable accommodation. So a business is required to make a reasonable accommodation to the known physical or mental limitation of somebody who has a disability unless it would cause an undue hardship to that business. So known -- how does a business know that you have a disability, especially when you consider that most disability is invisible? Only a small percentage of disability is obvious, right? So how does an employer know? Well, the employer knows because you have requested a reasonable accommodation. You have disclosed your disability and the need for accommodation. So, you

know, I've known a lot of employers over the years, and very few of them are mind readers. So one of the obligations, one of the responsibilities that we have in seeking accommodation is to disclose disability. So our presentation today, the webinar today -- really, we want to focus on disclosure of disability, rather than on reasonable accommodations, and what those look like. Because that disclosure of disability really engages several things to happen that we'll talk about in a few minutes. Next slide, slide 13, Marsha.

So in this discussion of essential job functions, you know, what are those? So essential job functions are the reason why the job exists, right? That there are few people at this particular business that are performing this task -- you know, probably the easiest way to explain this is, you know, I have to travel a lot for my work. And so, what is an essential function of an airline pilot? It's to fly the airplane. There may be other tasks that that pilot does, but he or she is -- you know, the essential function of that job is to fly an airline and get people somewhere safe. So there are two -- two things to consider with essential job function, and the first is a determination -- is the function of the job essential, or is it marginal, or tertiary? So we are only required, as employers, to accommodate an essential job function, which is the reason why the job exists. So marginal functions or tertiary functions, those other tasks that aren't essential -- then we don't have

to be concerned with accommodating those. Those can be reassigned to somebody. They can go away. They don't impact the issue of accommodating somebody to do the essential job functions in order for them to be successful. So many of us may be engaged in customized employment, for instance, and so the question may come up -- well, so what are essential job functions in a customized environment? And the EEOC has provided guidance on this, and what they have said is, if we take elements of other jobs and create a new job for somebody, then those functions become the essential job function. So we still, as an employer -- you still have an obligation to accommodate somebody if they need some sort of accommodation to do those jobs, but then you look at that job -- those job tasks as you would a typical job description. So we're still looking at, even in a customized environment, accommodating people on the job. So let's go on to slide number 14, please.

So there are a couple of things you need to know, or need to consider about reasonable accommodation, and this first one is very interesting to me. And it says that the presence of a disability does not result in a presumptive reasonable accommodation. So what do I mean -- what do I mean by that? I had a sister of someone contact me three or four years ago, and she was just very angry, very, very upset, because her brother was about to lose his job. Now, the brother lived in Louisville.

The sister lived in Chicago, about five hours away, so it wasn't like she could just jump in the car and run over to his house. But the issue became that this fellow, 10 years prior to this phone call, had taken a job at a big box store, a big -- you know, like a Target, or a Meier, Wal-Mart, or whatever, and he had worked there for a number of years, and had a tremendous work history. He was great. Everybody loved him. He was getting the job done. There were some -- there were some informal accommodations that were put in place, and this is kind of the crux of the story. So this guy relied on paratransit to get to work, and for those of us who have worked with paratransit providers, we know that they are not always the most punctual, right? And I will -- not to be an apologist for paratransit providers, but how a paratransit provider can move as many people as they do in a day -- you know, hats off to them, because it is quite complex. But anyway, sometimes this guy was late. Sometimes he had to leave early, because the bus came early, because they're not going to wait on you, right? That's kind of the rules for paratransit. So, you know, things kind of went along. The guy was getting his work done, although, you know, he had this sporadic -- had to leave early, come late, type thing. And what happens with any business, right? Management changes. Personnel change. So what once was kind of a presumptive accommodation that was put in place -- all of a sudden, there are new people there, and they're studying this. And

they're saying, "No, this is not right," and they started writing this guy up. So -- and there was nobody -- I need to stop for a second and say he had a very successful work history, and -- but for whatever reason, there was nobody following up with him or the employer on the job, which -- you know, that -- that was the fault -- that was the mistake of the employment provider. But, you know, we had to work with what we had available. So the sister is on the phone with me, and was like, how dare they? Don't they know he has a disability? Well, no, they didn't know he had a disability. I had to ask the question, "Did your brother ever disclose his disability and the need for accommodation?" Well, no, they just should've known. Well, they didn't know. So this creates this environment of presumptive reasonable accommodation, when in fact, it was no disclosure. There was no -- there was no interactive process to look at what accommodations could be put in place to help this fellow. So it was a very difficult situation, and another word about that -- so I mentioned to you that this fellow had a number of write-ups. He had disciplinary action taken against him. You need to keep in mind that -- a couple of things. Number one, you can disclose your disability at any time. So it doesn't have to be when you walk in the door. You know, some people may choose to do that. I have a very dear friend of mine who is an Identity First advocate, who will say, "I want to put my disability out on the table right up front, because it is

not everything that I am, but it is a facet of who I am. And I want to present a whole picture." So, you know, she chooses to disclose right at the start, but you don't have to disclose your disability. Let's say you can perform the essential functions of a job perfectly well without accommodation. You may -- you don't have to disclose that disability, and the majority of people with disability working in the country today do not disclose disability. But here's the issue. So some disabilities, for instance, are degenerative, right? So things may get worse over time. So you might start getting write-ups, and this was the case with this guy, just to kind of draw the parallel, is he started getting written up for being late to work or having to leave early. Once you do disclose your disability, it doesn't erase the past. So those write-ups, those disciplinary things that may have occurred prior to disability don't -- they're not erased. They don't go away. They remain on your personal record, but moving forward, then, you could not be disciplined after requesting that accommodation. Now, employers have two obligations here. The first, they can -- they have to determine if, in fact, there is a disability, and if they are in fact accommodating an essential function. So they may ask for documentation of that disability. That's okay, but you are only required to provide that documentation that is necessary to -- for that particular disability, and for that particular need for accommodation. There's another lady I know who has several different

disabilities, yet she's only disclosed one of her disabilities because the others aren't valid or aren't -- what do I want to say? Not valid. They aren't specific to the need for her accommodation methods. So anyway, we need to make sure that when we -- that if we choose to disclose, when and to whom we are going to disclose. Number 15, please, Marsha. So who has rights under the ADA? Because there are some things that are laid out here, that we need to talk about. So there are three prongs of disability determination. The first is, you have to have a disability. Seems kind of obvious, right? So you have to have a disability that significantly impacts a major life area. So that's one prong of disability determination. The second -- you may have a record of having that disability. So let's say you may have had cancer in the past, and that cancer is in remission, or you may have a disability that is cyclical, that may impact you more severely at one time versus another time. Perhaps it's a psychiatric disability, for instance, and, you know, bipolar comes to mind. So you may have a record of having a disability, but, you know, you're going through these cycles. So the disability may not be obvious, and it may not impact your ability to perform the essential functions of the job, you know, in certain cycles. So that's number two. The third prong of disability determination is being regarded as having a disability, and this is kind of an interesting inclusion in the law, this third prong of disability determination.

Because you may not have a disability that impacts a major life area, but you may have something about you that might affect the perceptions or the attitudes of either your boss, or coworkers, or the public. Maybe you have a disfigurement. Maybe you're -- you know, you've been a burn victim, for instance, and so you have some disfigurement or something that changes attitudes and perceptions. So under that third prong of disability determination, if you feel that, because of those perceptions and attitudes, that you had been discriminated against, then you may get protection under ADA title one. Next slide, please, Marsha.

So what's a disability? As I said, it is a physical or mental impairment that would substantially limit a major life area, and I want to stop for a second and point out the second part of this slide here. That employers, under that third prong of disability determination, that "regarded as"-- an employer wouldn't have to provide an accommodation to a "regarded as" disability, only a disability that impacts a major life area, or subsequently that you have had a disability in the past -- cyclical. So going back to this issue of a physical or mental impairment that impacts a major life area -- it could be, you know, hearing or seeing, cognition, as we mentioned before, cancer, diabetes, or some other medical condition. Could be mobility impairment. It could be cardiovascular, for instance, or respiratory, or reproductive, or

digestive. It could also be genetic disability. So it -- you know, there is a broad range of disability.

And Marsha, if you go to slide 17 -- so what had happened is -- remember, we had said that the Americans with Disabilities Act was passed in 1990. And what we saw from 1990 into the early 2000s is we saw a narrowing of the definition of disability, so fewer and fewer people were gaining protection. So the focus became, in the courts -- not was I discriminated against, but prove to me that you have a disability that affects a major life area. So our Congress -- and, you know, my own editorial comment is, you know, sometimes Congress does get it right. In the early 2000s, they said -- or in the mid-2000s, they said, "No, you guys don't understand the intent of this law. The intent wasn't to prove you have a disability. The intent is to prove that your civil rights have been violated. So what we want under ADA, which is the Americans with Disabilities Amendments Act, is we expect a broad interpretation of disability." So that's where you see, like, reproductive disabilities, digestive disabilities, genetic disabilities. That broader range far beyond just having visual impairment, or hearing impairment, or mobility impairment comes into focus under ADA. Slide number 18, Marsha.

So often, we're asked -- this only applies to people who are full-time, you know, 40-hour-a-week jobs, right? No. You can receive protection under ADA Title I not only if you are a full-time employee, but even, as we mentioned earlier, a pre-employed applicant. You know, before you ever walk in the door, "I need accommodation." Then I have protection under ADA Title I, but then, beyond that, it also applies to people who are working part-time. Part-time employees have protection. Seasonal workers have protections under Title I, as well as temporary workers. Now, temporary workers -- and again, this is easier in an in-person environment, where we can discuss the obligations of the host employer and the temp agency -- like, if there's an accommodation, and this accommodation requires some sort of financial investment, well, who pays for that? And -- you know, so we can't get in for that today, but essentially, both share equal responsibility for ensuring that that accommodation is put in place, and is paid for. So, again, the point is, you don't have to be a full-time employee. You can be a part-time employee. You could be working 10 hours a week, and you can still get protection under ADA Title I. Slide number 19, please, Marsha.

So just quickly, before I turn it over to Pam, let's talk about the association provision. So the association provision says that if I have a known disability with somebody -- or if I have a known relationship with somebody who has a disability, then I may have protection under ADA

Title I. So here's a couple of for-instances. Let's say that I'm applying for a job, and that employer finds out somehow that I have a child with a significant disability. And so, the employer may think, oh, my God, if I hire this guy, you know, he's going to be taking an extraordinary amount of time off work, because he's got to care for his kid with a disability. So I'm not going to hire him. So if I believe that is the case, under that association provision, I may have protection, under ADA Title I to say, "Hey, my rights were violated, because that employer knew that I had a kid, and based his presumption not on fact, but on his own personal beliefs -- his or her personal beliefs." So here's a -- you know, couple other examples. Maybe you have a family member with a preexisting condition. Maybe, you know, you're a female, and the employer has learned that both your mother and your sister may have had breast cancer in the past. And so, the employer then makes some presumption -- oh, my gosh, cancer runs -- breast cancer runs in that family. I can't hire her, because my insurance costs are going to go through the roof. So then, you might have protection under the association provision. And then, finally, you know, if you have a friend -- you know, you know someone who is HIV, for instance, and you're working on a job, and an employer might learn of that, and might fire you based upon their own stereotypes and presumptions, rather than fact. Then you might have protection under the association provision.

So this first part -- this is kind of setting it up in a nutshell. This is the ADA. This is who has protection. This is what the law says. So now, we're going to move into these decisions of disclosure. Whether or not it's right for you -- because it's -- you know, as we said, it's not always right for everybody to choose to disclose that disability. So, Pam, I'm going to turn it over to you. And Marsha, would you advance to slide 20?

>> **Pam Williamson:** Thanks, Barry. I greatly appreciate it. First of all, I want to acknowledge that we are monitoring your questions, and that we will be addressing those when we get to the end of the presentation. So don't -- don't despair. We will get to your questions. You've had great questions so far. Well, as Barry said, you know, disclosure may or may not be right for everybody, and this is a huge decision to make when someone is trying to decide -- do I disclose my disability? Don't I disclose my disability? And it's also a personal decision. So, over the next few minutes, we're going to chat about some of those aspects of why you disclose, why you might not disclose, and all of those pieces that go into decision-making. I am a researcher by nature, and these are the kinds of things I want to know prior to making any decision. Before I bought my last car, I researched cars for nine months before I ever stepped onto the lot to buy one. And the

salesperson looked at me and said, "I don't really like dealing with people like you," and he said, "Because you actually know what you want, and I can't get away with anything." Well, this is the way I want you to think about this today. I want you to look at all of this information as a way for you to think through this, and then help the folks you work with think through whether or not it's the right thing to do. Marsha, if you can advance the slide, please.

First of all, let's talk a little bit about two terms. The first is disclosure, and disclosure is a term under the Americans with Disabilities Act. And it is all about whether or not to share information about a disability, and that's a voluntary sharing of information about a disability. Now, there's also another term that's important that you know about, and it's called self-identification. The reason I bring this up is because you may work with employers who are federal contractors, and federal contractors often -- or actually have an obligation under Section 503 of the Rehabilitation Act to recruit and hire people with disabilities. They have what's called a 7% utilization goal, and that's a fancy term meaning that the federal government has asked them to target a minimum of 7% of their workforce be people with disabilities. So in order to be able to meet this goal, then the employer in this particular setting -- the federal contractor has the -- needs to be able to know if they have employees who are employees with disabilities. So as a

federal contractor, they may send out a notice, usually once a year, asking people to voluntarily check a box that indicates whether or not an individual has a disability. Now, this is supposed to be totally anonymous, and again, it's voluntary. And it should be used for data collection purposes only. So this is -- so I want to make you aware of that, because oftentimes, you will see these questions, and you may wonder whether or not they are actually legitimate questions that can be asked. So you have to understand the context in which the information's being requested. Next slide, please.

So as we're thinking about disclosure, there are a few things that we need to keep in mind. First of all, there's no standard form. There's no specific information that has to be shared when seeking accommodation in the workplace. Now, although a form might be a good best practice or a good standard, just to start the conversation, it's not required. And the disclosure can be made in many ways. It can be verbal, where an employee or someone on his or her behalf says, "Hey, you know, this person's having -- I'm having a little difficulty with getting here on time. I need to talk to you about this." Could be a written request, and -- where a person actually puts the request in writing, either via e-mail, or a memo of some kind. Again, it could be e-mail. So it could be electronic, or it could be -- so that would go to a person that's in charge of that, whether it be a supervisor or human

resources professional. And again, a person can make an accommodation request on behalf of the employee. Personal example - my husband -- at one point in time, I had to be hospitalized due to a -- due to a disability-related condition. I was not in a position to call my employer and say, "Hey, I'm going to need some extra time off, because I'm in the hospital to deal with this disability condition." So he called on my behalf. It also could be as simple as a person may not know how to ask, and may need -- or may need the guidance of a job coach, or a supported employment professional. There are many reasons why a person may need assistance in requesting an accommodation, or disclosing a disability. Next slide, please.

So there are several reasons a person may choose to disclose. So one of the most obvious reasons is because there's an obvious disability. A person may use a wheelchair for mobility purposes. The person may have a hearing loss, and need a sign-language interpreter, or cart services. A person may have another type of disability. They just want to be able to address any concerns head-on with an employer, whether that's in an interview situation or an -- or if it's an acquired disability once the person has been on the job. The other -- another reason is that -- because a person does need an accommodation, either to be able to participate in an interview or do the job. So if a person who is deaf or hard of hearing uses sign-language interpreters to -- or needs a

sign-language interpreter in order to communicate during the interview, then it would be a good idea to disclose that, so that you can request that sign-language interpreter ahead of time. So it may be that you have a person who has a cognitive disability and may need assistance in understanding questions that are being asked in an interview. Again, that's a request of an accommodation ahead of time. So disclosure could offer competitive advantage. We talked about the federal contractors who have obligations to target, and recruit, and hire people with disabilities. By identifying as an individual with a disability, that person may be put into a pool of applicants that might be considered because he or she has a disability. If it's for a federal job, even though federal jobs are not necessarily covered under the ADA, there is Schedule A hiring, and that could also be a reason a person might want to identify as having a disability. Because a person who has a disability that could be hired under Schedule A could be put in, again, a different pool to be looked at as an individual with a disability to be hired into the federal workforce. We've talked about bringing, you know, your whole self to work. You know, a person may choose to identify as an individual with a disability first, and again, it may not be the only way he or she identifies. However -- so it will be -- it just allows that person to be able to bring every piece of him or herself to work, and to be able to embrace the whole person. And it will also help to

explain the participation of a job coach or an employment specialist in the process. One of the things that Barry taught me early on is that the role of a job coach or an employment specialist -- it's a little weird to begin with, so let's -- because it's -- because it's not every day that an individual shows up with someone either on the job or in an interview. So you want to be able to address these issues up front, so that there are -- so that it at least will lessen the possibility of discrimination when a person is either applying for a job, interviewing for a job, or on the job. Next slide, please.

Now, there is an art to disclosure, and I like to think of disclosure as taking your paintbrushes, and putting them to paper, and really trying to put together a picture for the potential employer, or the interviewer. Because good disclosure has many components to it. First, it focuses on the needs -- the needs of the individual to be able to be successful in the job. You don't want to focus on the deficits, or the things that a person can't do. What can this person bring to the table? What are their strengths? Always focus on the needs and the strengths in order to be able to look at the -- and to -- when you're disclosing, so that a person is looked at in a positive light, and what he or she brings to the table. Also, too, always approach disclosure with viable suggestions for reasonable accommodations. So I'll give a personal example. I take certain medications that make it very difficult for me to get moving in

the mornings. It's not -- it's not that I don't want to wake up. It's that I can't wake up, and so, when I first realized I needed a reasonable accommodation, I came -- went to my supervisor and said, "Look, this is the way it is. If you'll let me work from 10:00 a.m. to 6:30 p.m., you'll get a better workday out of me than if you expect me to be here at 8:00 a.m. Because I may be here at 8:00 a.m., but you're not going to get anything out of me until after 10:00, because I just don't function. Well, it was a suggestion, and it worked. So -- and by working those alternate hours, I'm able to allow my body to do what it needs to do, and my employer gets 100% out of me, versus 50%. The other thing with disclosure is that it can be specific to the -- how the disability affects a person's ability to be able to perform the essential job functions. Don't make it a generic overview. I mean, get down to those essential job functions. Okay, what will it take in order for the person to be able to -- be able to do the job. And again, focus on the job qualifications. What is it that the person needs to be able to do on the job? And don't focus on the disability. You want to be able to look at what the qualifications for the job are. Some of the qualifications for my job include being able to train, so they include being able to communicate with our subcontractors in various states, and to be able to work with our colleagues across the nation. Well, it doesn't -- so it actually has worked out well that I work from 10:00 a.m. to 6:30 p.m., because I work with

colleagues on the west coast. They don't appreciate a call at 5:00 in the morning if my day starts at 8:00 a.m. So they would much rather me wait and call them later in the day, so that they are being called at a timeframe that works for them. So the job qualification is that I be able to communicate with my colleagues in a timeframe that works for both of us, not that I can't -- not that it's difficult for me to be able to be there at 8:00 a.m. So it's more of being there at a time that works in order to be able to do my job. Next slide, please.

Again, try -- avoid medical terms and labels. We want to be able to focus on an individual's strengths. Medical terms and labels make it very difficult to get out of that medical-model mindset of a person needing to be fixed. So we want to be able to talk about -- so instead, looking at what the barriers may be in the workplace. How do we address the barriers? What are the accommodations that can be put in place, and when a person discloses, what can we do in order to be able to address these? The other thing that's so very important is to focus on the here and the now. Negativity from the past does not do anything except set a person up for failure. By focusing on the here and the now, and what a person is able to do from this point forward makes it a much more positive experience, and also helps both the employee and the employer to be able to focus on what a person can do with or without that reasonable accommodation. And also, too, look at

disclosure as a positive thing, because it needs to be -- because the whole goal of disclosure is to be able to either ask for reasonable accommodations, or to be able to bring the whole self to the workplace in order to -- so that you can have a successful work experience for the employee with the disability. Next slide, please.

So the question's come up -- so who do I tell? Who do I disclose to? This is truly going to vary, depending on the employer, the situation, and the organization. It's going to -- it also will depend and vary based upon the size of the employer, because a small employer with, say, 16 to 20 employees may not have a dedicated HR department. They may have one person, but it may be the owner of the company. So -- whereas a large employer that has over 5000 employees may have a dedicated human resources department. The audiences, or the people you may disclose to could include recruiters for the company, the hiring managers. It could be a supervisor or a manager. It could be that human resource staff that we just talked about. Employee-selected coworkers -- I want to talk a little bit more about this, because a person with a disability may choose to disclose to selected coworkers. So I want to emphasize that it's the employee's choice as to whom that is disclosed to, and unless there has been a conversation with the HR person, the supervisor as to whether or not it's okay. Because you want to make sure that the information is not going out to just anyone. The

other people that may also need to know are health and safety staff. This is really important, especially when looking at emergency evacuations or other things, so individuals with disabilities who may need extra assistance are able to be identified by those health or safety staff. The main thing here, and the key, is to only tell those who need to know. So -- and that list should be short, rather than long. I'll give a personal example of some of the people I've chosen to share with over the years. As my supervisor, Barry knows about my disability, and I've shared with him. I've shared with our director of operations and our HR -- and our HR staff as needed, but I've also chosen to share with selected coworkers. So that they know if I'm having a bad day, they need to understand what's going on, or they can step in and say, "Pam, you might need a break." Because often, they notice the time I need a break before I notice the time I need a break, and it's -- so it's my own support system that I've put into place. But again, it's people that I've chosen to share with. Next slide, please.

One of the important things to remember about disclosure is that in today's age of social media, employers may use social media to get information on a job candidate. And once you put information out there in social media, it may unintentionally disclose a disability. There may be pictures. There may be comments, things like that. Those tell a story about us, whether we want it to or not. And so, these are things

that happen so that it -- so that we need to be aware that what we put out on social media -- and Marsha, if you'll go to the next slide, please.

Can you back up one? There we go. So the -- that employers may -- so once you put information out there on social media, it's there forever. And so, be careful what you want the -- want out in the public domain. It's okay if you want it out there, but if you don't want information to be used, and for folks to be able to look at the information, then don't put it out there to begin with. Next slide, please.

Now, we've talked a lot about the employees' rights and responsibilities, but the employer also has rights and responsibilities when we're looking at the reasonable accommodation process. And one of the things that comes up a lot when we talk to both employers and employees is that -- the right to request documentation, and an employer does have the right to request documentation about the disclosed disability. It's not enough for me to go to Barry and say, "Barry, I've got X disability. Then I need -- you know, and I need this." So he has every right to say, "Pam, I need a little bit more information about how this impacts you." Now, having said that, it does need to be job-related and consistent with business necessity. So put in plain terms, that means no fishing expeditions. So what's needed is that very specific information for the impact that it's going to have on the job,

and so that -- and how it's going to impact the job. So I -- so Barry doesn't need my medical history for the last 30 years. It would probably put him to sleep, anyway. So Barry, if you need a night's rest sometime in the near future, let me know. But it's -- you want to be able to make sure that the documentation is set to a certain timeframe, and set to just the information that's needed related to how the disability affects the job. The other pieces that are so very important is that disability documentation must be kept confidential, and kept in a secure file separate from the employee's work file. That's a -- not only a physical work file, but electronic work files. They must be secure and separate. Next slide, please. Next slide, please.

So we need to talk a little bit more about when an employer might ask about a disability. Now, in the regulations, this is often called a disability inquiry. And so, it's a question or series of questions that might get information about a person's disability or a related medical condition. So we're going to talk about a few examples of when this might happen. Next slide, please.

The first -- the first time that this might happen might be in the pre-employment phase, or before an offer of employment. Now, at this point in time -- so no disability inquiries are allowed. So an employer or a recruiter is not allowed to ask about a disability at this point in time.

Now, keep in mind, as an applicant -- so you may choose to disclose, but you are not -- but it is -- but you may not be asked about disability. The other phase of employment when this might occur would be pre-employment, but post-offer. So an offer of employment's been made, and -- but some disability inquiries are allowed if the same inquiry is made of all candidates for the same job category. So there will be -- so there may be times when it's related to either the Office and Safety Health Administration requirement for a job, and so -- and the -- an example there would be for a truck-driving position. There are certain drugs that the -- that Department of Transportation does not allow an individual who is driving a truck -- 18-wheeler to have in his or her system. That's a time when it would be okay to ask those questions. Again, it would have to be asked of all candidates for the same job category. And then, the other times that an inquiry might be made is during employment, and it has to -- goes back to being job-related and part of -- and consistent with business necessity. And we've discussed that a little more. Next slide, please.

So what can an employer ask in a disability inquiry? You can ask about a person's general wellbeing. So, you know, during the wintertime, I mean, almost all of us get colds, or sinus infections or something, you know. So, John [assumed spelling], are you feeling okay? I see you got a snotty nose. I've been miserable for a week. That's fine. There -- you

know, and -- or a non-disability-related impairment. You know, somebody went on a skiing weekend and had a tumble down the mountain, and broke their leg, you know. So, you know, it's -- you know, Jane [assumed spelling], are you okay? So I see you broke your leg. That was -- you know, that's a bummer. You had your first skiing accident. But you can also talk about whether or not a person can perform the essential job functions. Going back to my job -- part of my job is being able to train. You know, I need to be able to share information and share it accurately and effectively. You know, sometimes that means I need to be able to be in front of a group, in person. Other times, I get to share via webinar, like we're doing today. So -- but that -- so part of the essential job function is that I be able to train and share the information accurately. Does that mean I have to be sitting in my office at all times to do a webinar? No. You can do a webinar from any point -- place in -- where you have a good, solid internet connection, and you're able to access your computer. So whether or not a person has been drinking alcohol -- an employee can ask about alcohol use, because they can still have standards that can -- need to be met on the job. And if it is an alcohol-free workplace, then that is a question that can be asked. Having said that, it's important to know that alcoholism is a covered disability under the ADA, with certain caveats, and if you've got specific questions about that, we'll give you

resources to call us later. You can also ask about current illegal use of drugs. I want to make sure you understand -- illegal use of drugs can be prescription drugs or illegal street-type drugs, and again, I -- an employer is allowed to have a drug-free workplace. So -- and so, that is something that is covered. So that's something that's covered, and an employer can have that -- can do drug testing. And it's allowed, and so I want to make sure you understand that. So an employer can also -- so, you know, an employee's pregnant, and you want to have a baby shower. That's fine. There's no problem with that. So -- and then, of course, an employer can also ask for emergency contact information in case there's something that happens on the job. Next slide, please.

Next slide -- thank you.

So, now, there are a few things an employer cannot ask in a disability inquiry, and one is whether or not a person has had or has ever had a disability. So -- and the medical -- medical documentation of a condition -- remember, any documentation that is requested must be job-related and consistent with business necessity. Genetic information -- there is another law that protects people, in addition to the ADA. It's called GINA, G-I-N-A, the Genetic Information Nondiscrimination Act. An employer cannot ask about prior workmen's compensation history, or current or past prescription medication usage. Next slide, please.

All right, there are several tools and resources that we have listed for you. I am not going to go through each of these in detail at this time, because I want us to have the opportunity to get to our questions.

But having said that, Marsha, if you could go to slide number 37, please -- -- for those of you that have attended the webinars thus far, you will understand the importance of this slide. This is Bandit, the Amazing Dog Assistant, also known as my ADA, and he goes to work with me every day. And you have two pictures of him. One, he is at the computer, and yes, he does know how to change my screen when he gets aggravated with me, and two -- so he's in his car seat, and hooked into the -- hooked into the seat belt. You will want to remember this information for the post-test, hint, hint.

So at this time, I am going to switch over to our questions and answers. We have about nine minutes left, so if you will hold -- hold on just a moment, I am going to go back to that list, and -- that we have been keeping. And the first thing I do want to address in the -- that someone shared, and I do want to acknowledge that we do have two colleagues on here with us. One is LaWanda Cook, who is with the Northeast ADA Center, and also Rebecca Williams, one of our ADA information specialists. And she's been responding to some of your questions as we've gone along, but we wanted to make sure that you also knew

that, in addition to the Americans with Disabilities Act, that there -- that the state law may actually apply to a smaller number of employees. Private employers under the ADA who have 15 or more employees are actually covered under the ADA. However, some state laws cover employers at much smaller number of employees, and for example, in the State of New York, it's four employees or more. So just wanted to make sure that you know that sometimes, that there are -- that state laws are stricter, and that's a good thing. So we're going to start out with a couple of questions, and Barry, I'm going to let you take the first one here. It says, "Can an employer say you" -- and at this point, I'm assuming a supported employment professional or job coach -- "cannot be present during an interview?"

>> **Barry Whaley:** Well, it -- was this the question from L. Snyder [assumed spelling]?

>> **Pam Williamson:** Yes.

>> **Barry Whaley:** Yeah, as I read the question, it seemed to me what she was getting at is that a job may previously have been negotiated for someone, and that the employer wanted to sit down and have kind of an introductory interview, or a sit-down-and-get-to-know-you. That's how I interpreted the question, and, yeah, that's perfectly all right. I

mean, you certainly don't want to be a wedge between that employer and the employer getting to know a new employee, right?

I had a colleague at Northern Kentucky University who does work in inclusive higher education, and so, one of the tenets of inclusive higher education is to have someone act as a mentor to a student. And she was having difficulty finding a mentor, and finally, one day, she found one. She takes the mentor to meet the student, and the student's sitting there on the floor in the hallway, having a great time. She had made friends with, you know, the other students who did not have a disability, and it occurred to her -- okay, all I'm doing is coming between this naturally evolving relationship. So that's the long answer to -- yeah, that's okay, to -- for them to get to know each other. We want to create a welcoming environment.

>> Pam Williamson: Very good. Very good. So, all right. Let's go to one of the next questions. One of the next questions was, "Is there a go-to list of reasonable accommodations?" And what I want to emphasize here is that reasonable accommodation can be as wide and varied as each of us in the -- participating on this webinar. Because it is very important to know that it has to be looked at on a case-by-case basis, and the regulations use a term called the interactive process. And that -- so I'm going to put this in Pam's plain language. I am a southern

girl. I call this calling -- sitting down, having a glass of sweet teat and a chat, okay? The employer and employee must discuss what's needed, where -- you know, what is it going to take in order for there to be an essential -- in order for this employee to be able to do the essential function of the job? And it can be a conversation back and forth about what will work.

Now, the ultimate decision does -- as to what that accommodation will be does lie with the employer. However, the key is that it must be effective. Now, you do have multiple resources available, so that you can discuss potential job accommodations. One is the ADA National network, and you can always call our number at 1-800-949-4232, and then another excellent resource is the Job Accommodation Network. And their website is [www.ask -- A-S-K-J-A-N.org](http://www.ask--A-S-K-J-A-N.org), askjan.org.

>> **Barry Whaley:** Right, and Pam, keep in mind there is a mobile app that JAN produces, the Mobile Accommodations Solution that you can download, you know, if you need help trying to think about accommodations. Keep in mind -- who's the best authority on what accommodation works best? It would be the person seeking an accommodation, right? It's always important to listen to the person seeking accommodation. What's worked in the past? What do you do at home? What are some things that you've done that you might not

even consider an accommodation? So that's a very important resource, too.

>> Pam Williamson: Yes, yes. All right, I am going to address one more question here that -- and I'm going to address this one because it's something that comes up quite often. And now, the other questions -- we will take a look at those, see if there's -- if we need to post some follow-ups to them on our website. So the last question we're going to address today before we close is, "If an employee asks for a flexible schedule because of disability, is it acceptable for the employer to tell other employees, so that they will not be upset that one employee is getting special treatment? I have a client who has to have kidney dialysis. She did not want the other employees to know, and the employer told the office staff." Okay, here's the -- here is the things that need to be considered.

One, an employer should never disclose about an employee's disability to people who don't need to know.

Secondly is that if an -- so it is always an employee's choice as to whether or not coworkers who do not need to be in the know -- it's the employee's choice as to whether or not he or she wants to have the disability-related decision disclosed. What we encourage, and what has -- and what has been shown to be one of the best practices in situations

like this is that, if a person needs a flexible schedule because of a disability-related condition, one -- so there does not need to be a disclosure, so -- of the person's disability.

Two, all that needs to -- all that needs to be known is that this person will be working this schedule, and that's it. And the reason -- because you don't want to -- you do not want to -- the employer does not have a right, nor is he or she allowed to discuss the disability with coworkers. If a coworker does come up and say, "Well, why is she getting -- she getting preferential treatment?" The standard answer that has typically been accepted by the Equal Employment Opportunity Commission, and encouraged, is, "You know, we -- so we work with all employees to address any issues that they may have," and leave it at that. Very generic, very easy, and that we want to, you know, be -- this to be a successful work environment for all employees.

So I want to encourage you, though, to make sure that -- you know, that you are not disclosing disability to people who don't need to know about it. So -- all right. I know we have had a phenomenal -- so a phenomenal time today, a lot of information. So if you will hang with me for just another minute or so, we are going -- I will give you information about the post-test.

We do appreciate the fact that you've joined us today for this webinar, "ADA Employment and Disclosure," and there are two types of education credit available, the Certificate of Education and credits for Certified Employment Support Professionals, CESP. So to receive credit for the webinar -- so you must meet four requirements. One, you must have registered for the webinar. That's how we send you the information for the post-test. You must listen to all of the webinar, live or archive. You must attend, and your attendance must be verified.

And you must complete the multiple-choice post-test for part three.

The post-test will be sent to you within an hour of the webinar, and so, you should be expecting it via e-mail if you registered. After you submit the post-test and your attendance is verified, you will be provided with a link to print your Certificate of Completion, and an additional copy of it will be sent via e-mail to the address you provided for the post-test.

So for those of you who are typing in that you attended for the entire webinar, you don't have to do that. I appreciate it, but we do have another way of verifying the information. In addition to all of this, we do value your feedback. It does help us to determine the effectiveness of the webinar and our future webinars. It also helps us to be able to identify topics of interest to you. So again, the link for the post-test and evaluation will be e-mailed to all registered participants within an hour

after the webinar's end, and all of the webinars for the eight-part series are archived with a recording, both video and audio, the presentation, and a transcript. The archives may be found at adasoutheast.org/webinars/archives.php.

Thank you again for being with us for this part three webinar. We want you to save the date for the next webinar on Tuesday, September 24th at 2:30 to 4:30 -- excuse me, 2:30 p.m. to 4:00 p.m. eastern time. We already have over 500 people registered for part four, so please encourage your colleagues to go ahead and register early to ensure that they get a spot. Additional information will be sent out about part four within the next few weeks. We look forward to --

>> Barry Whaley: Go ahead.

>> Pam Williamson: -- yeah, if you have any questions about the Americans with Disabilities Act, or any of the information you heard today, please do contact your regional ADA Center at 1-800-949-4232, or you may also contact the Southeast ADA Center at 404-541-9001, or by e-mail at adasoutheastsyr.edu. All calls and e-mails are confidential. And Barry, I believe you have some information.

>> Barry Whaley: Well, number one, if -- you know, folks, you don't have to remember even half of this. Just remember you can call your

regional ADA Center. There's the number up on the board. As you can see from Lawanda and Rebecca being online today, that they're tremendous resources. Number two, I want to thank you personally for all the work you do. Having done supported employment for 23 years, the job is not easy, so thank you for all that you do in helping advance Employment First and good jobs for people. And third, if you're not a member of APSE, shame on you. You need to join APSE, and we'll see you next year in Denver for the next APSE national conference.

>> **Pam Williamson:** All right, thank you, everyone! And hope you have a great rest of the week and enjoy celebrating the 29th anniversary of the ADA on Friday July 26th. Bye-bye.

End of Transcript

Webinar Part 3: The Americans with Disabilities Act (ADA), Employment and Disclosure

Webinar Series: Advancing Equal Employment Opportunities and Creating Inclusive Workplaces

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