

Fighting for Safe Access in a Masks-Optional Healthcare Environment

A Workshop on Making Reasonable
Accommodation Requests Under the ADA

June 27, 2023



Who We Are

Emma Martin (she, her)

Community Engagement Program Manager
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Beth Kenny (they, them)

Member
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Topics
to be
Covered

COVID Mitigation Measures in Healthcare – Claudia

Impact of Current Healthcare Environment on Patients – Beth

The ADA and Disability Rights – Claudia

How to Make a Reasonable Accommodation Request – Claudia

Next Steps if Your Request is Denied – Beth

Questions and Answers

COVID Mitigation in Healthcare – History and Present

COVID Mitigation in Healthcare – History and Present

- **Federal Public Health Emergency**
 - January 31, 2020, begins
 - May 11, 2023, ends
 - May 11, 2023, CDC stops calculating COVID-19 community levels
- **California's COVID-19 State of Emergency**
 - March 20, 2020, begins
 - February 18, 2023, ends
 - April 3, 2023, mask mandate for high-risk settings (such as healthcare) ends



ID: A black stethoscope laying across a keyboard

COVID Mitigation in Healthcare – Current California Rules

- California Department of Public Health, [March 3, 2023, guidance document on masks](#):
 - Mask mandates end April 3, 2023
 - Masks “recommended” or “strongly recommended” in high-risk settings like healthcare based on community COVID levels – but CDC no longer tracking community levels

COVID Mitigation in Healthcare – Current California Rules (cont.)

- CalOSHA
 - [June 2023 California Workplace Guide covering healthcare:](#)
Surgical masks (with ties) or procedure masks (with ear loops) should be used for “source control” (aka symptomatic people)
 - [Healthcare facilities must follow CDC “Respiratory Hygiene” rules:](#)
 - Offer masks to persons who are coughing
 - Advise healthcare personnel to wear surgical or procedure mask when examining patient with symptoms of a respiratory infection

COVID Mitigation in Healthcare – Local Practices May Vary – Examples

- [San Francisco County](#): People who work in healthcare settings are still required to wear a mask when around patients
 - [San Francisco General](#): masking required for all patients, staff and visitors in all areas where patients are present
- [Santa Clara County](#): masking still required during “designated winter respiratory virus period”

COVID Mitigation in Healthcare –
Local Practices May Vary – Examples (cont.)

- [Alameda County, Contra Costa County](#): masking still required at Skilled Nursing Facilities (SNFs)
- [Los Angeles County](#): masking still required in all patient care areas
 - [Cedar-Sinai](#): masking required in all patient care areas and anywhere a patient can be anticipated—including lobbies, elevators and waiting rooms

Remember these
Takeaways –
We'll Come Back to Them

Most state mask mandates are over **BUT** existing guidelines show:

- Masking is *feasible*
- Masking is *recommended* for many settings
- Masking is still required in certain circumstances (see, e.g., CalOSHA “source control”)



ID: a light blue disposable surgical mask

Impact of Current Healthcare Environment on Patients

Impact on Patients Who are Vulnerable to Severe Effects from COVID

Vaccinations do not prevent COVID infection, do not prevent all severe outcomes from COVID infection

One-way masking does not prevent all COVID infection

- Some patients report contracting COVID even while wearing N-95 masks – this comports with studies using modeling
- Masks are typically not professionally fit-tested
- Some people cannot wear masks or wear them reliably
- Some health care requires that masks be removed

Impact on Patients Who are Vulnerable to
Severe Effects from COVID (cont.)

“No face mask provides
100% protection”

- **Peter Chin-Hong, MD**

UC San Francisco, infectious disease
expert specializing in patients with
suppressed immune systems

Lack of risk management
causes patients to be
anxious and fearful during
appointments, disrupting
communication and
assessments

Masks come off in the last refuge for mandates: The doctor's office



By Fenit Nirappil

May 1, 2023 at 6:00 a.m. EDT



Jenna James, who has long covid and other chronic conditions, feels uncomfortable in hospital settings now that masks are no longer required. (Jenna James)

Impact on Patients Who are Vulnerable to Severe Effects from COVID (cont.)

- Risk of delaying / avoiding care vs. risk of accessing care without mask mandates and COVID-19 protocols in place
- Fenit Nirappil, “Masks come off in the last refuge for mandates: The doctor’s office,” Wash. Post (May 1, 2023) (accounts of patients)

ID: Article in the Washington Post titled “Masks come off in the last refuge for mandates: the doctor’s office”, with a photo of a white person with brown hair sitting in bed under a yellow blanket, next to a dog



Chamomile Harrison, left, stands with her mother, Diane Harrison, on Thursday, June 8, 2023, at their home in Jefferson County in Wisconsin. *Angela Major/WPR*

Vulnerable to COVID-19, patient calls retreat of hospital mask mandates a 'betrayal'

Chamomile Harrison and immunocompromised people worry about scaling back mask mandates. One UW Health doctor is urging stricter requirements, too.

By Jonah Beleckis

Published: Wednesday, June 14, 2023, 6:05am

Impact on Patients Who are Vulnerable to Severe Effects from COVID (cont.)

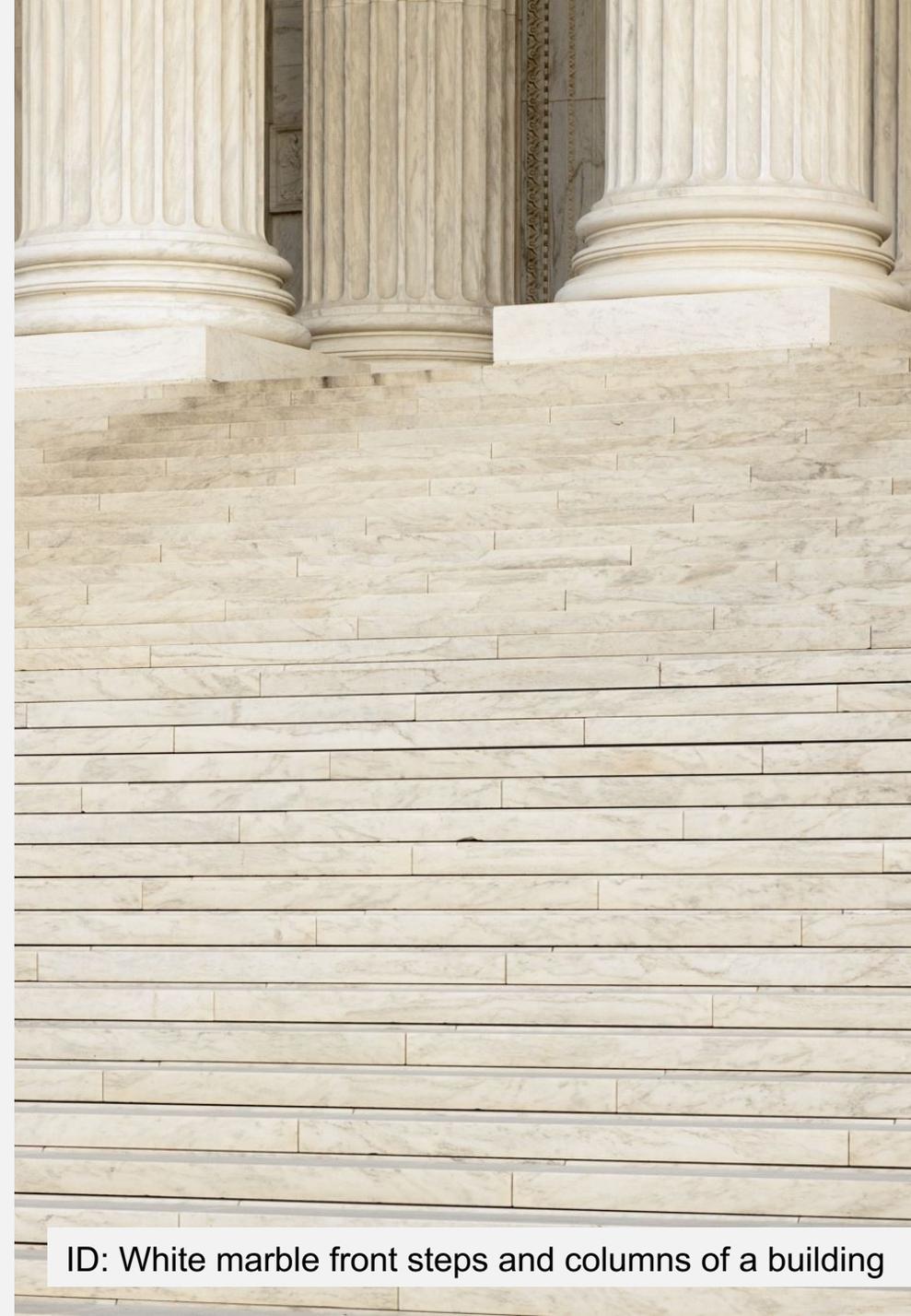
- Jonah Beleckis, “Vulnerable to COVID-19, patient calls retreat of hospital mask mandates a ‘betrayal,’” Wisc. Public Radio (June 14, 2023) (accounts of patients)

ID: Article and radio piece on website for Wisconsin Public Radio titled “Vulnerable to COVID-19, patient calls retreat of hospital mask mandates a ‘betrayal,’” with photo of two white people standing outside, one with white cane and “I am a pre-existing condition” t-shirt

Introduction to the ADA and Other Disability Rights Laws

Disability Rights Laws in Healthcare

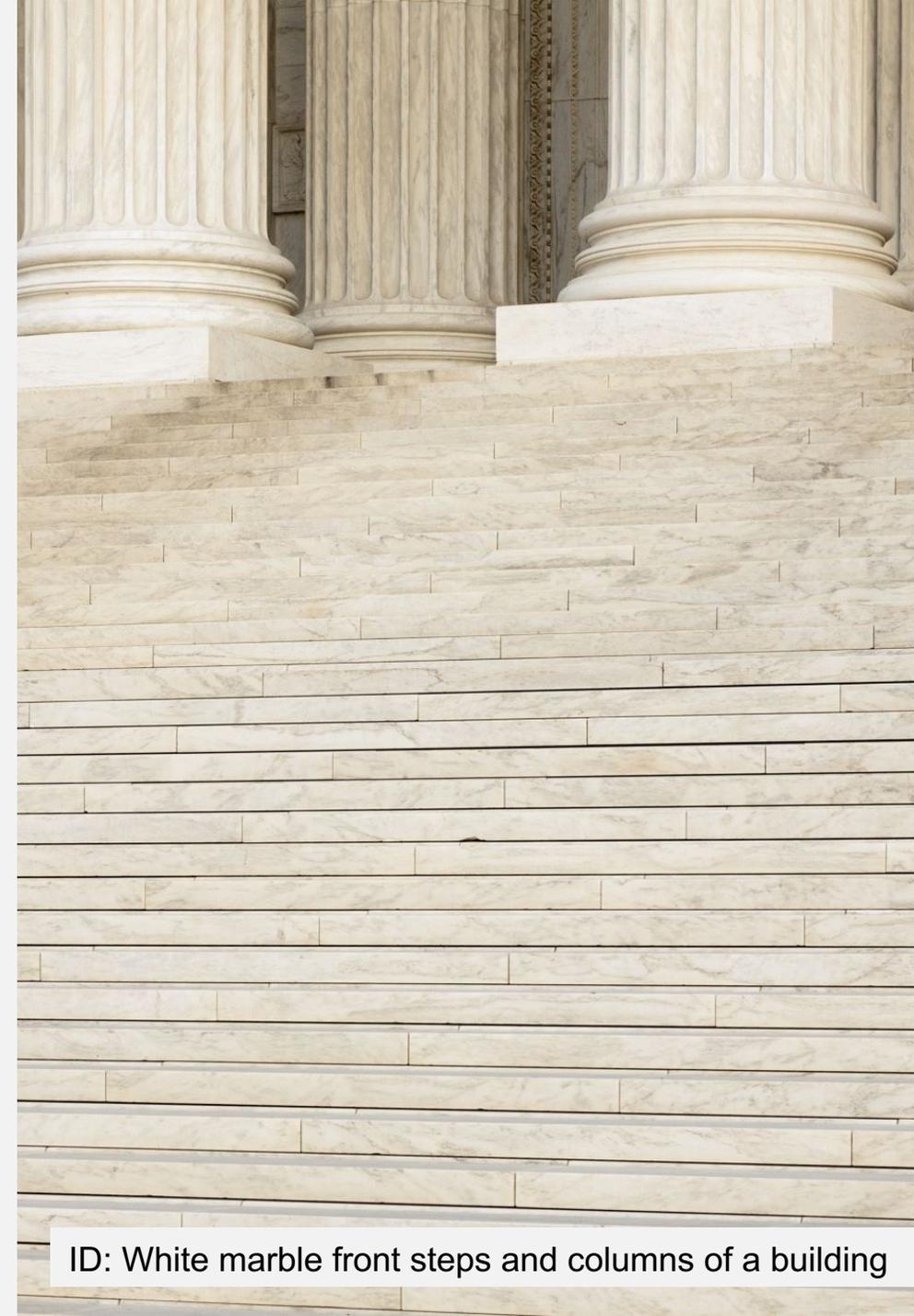
- State or local government healthcare providers:
 - **Title II of the Americans with Disabilities Act** (ADA), 42 U.S.C. § 12131, et seq.
 - Section 504 of the Rehabilitation Act, 29 U.S.C. § 794
 - Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. § 18116
 - Section 11135 of the California Government Code



ID: White marble front steps and columns of a building

Disability Rights Laws in Healthcare (cont.)

- Private healthcare providers
 - Title III of the ADA, 42 U.S.C. § 12181, et seq.
 - Section 504 of the Rehabilitation Act, 29 U.S.C. § 794
 - Section 1557 of the ACA
 - California's Unruh Civil Rights Act, Cal. Civ. Code § 51, et seq.



ID: White marble front steps and columns of a building



Disability
Rights Laws
in Healthcare
(cont.)

What do the laws require?

- **Equal access** to programs and services for people with disabilities, including
- **Reasonable accommodations** where “necessary” to nondiscrimination,
 - unless the covered entity can demonstrate “fundamental alteration”
- No **retaliation** or **interference**

What is a “Disability”? ADA Amendments Act of 2008

- Mental or physical impairment that substantially limits one or more major life activities
 - Or a record of such impairment, being regarded as having impairment
- “Substantially limits” construction –
 - Should not be “demanding standard,” see Findings and Purposes
 - No mitigating measures
 - Consider condition that is episodic or in remission in “active” phase
- “Major life activities” –
 - Expanded list of functional major life activities
 - Expanded concept and list of “major bodily functions”

What is a “Disability”?

Major Life Activities (cont.)

Citations: 42 U.S.C. § 12102; 28 C.F.R. § 35.108; 28 C.F.R. § 36.105

caring for oneself

performing manual
tasks

seeing

hearing

eating

sleeping

walking

standing

sitting

reaching

lifting

bending

speaking

breathing

learning

reading

concentrating

thinking

writing

communicating

interacting with
others

working

What is a “Disability”?
Major Life Activities (cont.)

Citations: 42 U.S.C. § 12102; 28 C.F.R. § 35.108; 28 C.F.R. § 36.105

Major Life Activities = operation of major bodily function:

immune system

bowel

cardiovascular

special sense

bladder

endocrine

organs and skin

neurological

hemic

normal cell growth

brain

lymphatic

digestive

respiratory

musculoskeletal

genitourinary

circulatory

reproductive

What is a “Disability”? Predictive Assessments

Citation: 28 C.F.R. § 35.108; 28 C.F.R. § 36.105



Conditions that are virtually always disabilities: deafness, blindness, intellectual disability, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, schizophrenia

Disabilities include ...

- **Psychiatric Disabilities:**
 - PTSD
 - Bipolar disorder
 - Schizophrenia
 - Depression
 - Anxiety
 - OCD
- **Traumatic Brain Injury**
- **Intellectual & Developmental Disabilities**
- **Autism, Neurodiversity**
- **Mobility Disabilities**
- **Sensory Disabilities:**
 - Deafness
 - Blindness
- **Learning Disabilities**
 - Dyslexia
- **ADHD**
- **Dementia, Alzheimer's**
- **Chronic Illnesses like:**
 - Asthma
 - COPD
 - Diabetes
 - High blood pressure
 - Kidney disease
 - History of cancer
 - Long COVID

Why Masking of All Present During Appointment is “Reasonable”

What is “reasonable”? Courts consider:

- Feasible
- Ordinary
- Not ordinary but justified given circumstances

Masking of all:

- Still required in some jurisdictions
- Still required statewide in some circumstances
- Feasible as demonstrated by past and present experience
- Modification justified by risk of severe health outcomes

**Possible
Reasonable
Accommodations
for Mitigating
Infection Risk in
Healthcare**

- Video telemedicine
- Masking of staff during time at site
- Masking of all people in environment during time at site
- Increased ventilation at site
- Separate space for waiting on site
- Waiting in car or outside until appointment begins
- Referral to site with COVID protocols
- Outside appointment
- At-home appointment

How to Make a Reasonable Accommodation Request

How to Make a Reasonable Accommodation Request

- **Mode: In Writing**
 - Fine to use telephone, but confirm in writing by email or through healthcare portal
- **Recipients of Email:**
 - Cast wide net to increase chances of getting to the right person
 - Include people like patient coordinator, ADA coordinator, appointment coordinator
- **Portal Request:**
 - Be specific: you are requesting a reasonable accommodation for a disability, ask for instructions



ID: Glasses laying on top of paper on a desk with a mug and computer in the background

How to Make a Reasonable Accommodation Request (cont.)

Elements of request for Reasonable Accommodation:

- **Disability**
 - Introduce self and state condition(s) that create vulnerability
 - Briefly explain why condition is disability under the ADA
- **Need Reasonable Accommodation**
 - State that you need reasonable accommodations to mitigate risk of transmission of COVID or another disease
 - State particular accommodations you are seeking
- **Willing to Communicate**
 - Make clear that you are willing to discuss your request, provide information, consider alternatives

How to Make a Reasonable Accommodation Request (cont.)

Additional helpful elements:

- **Personal experiences as disabled person**
 - Describe prior experience in which you experienced severe effects from COVID-19 or another illness and suffered harm (e.g., missed substantial school or work)
 - Describe prior experience in which you were forced to be in a risky setting for a necessary appointment and experienced disruptive fear and anxiety
 - Describe a prior experience in which you were accommodated for an appointment, and everyone found the accommodations to be feasible and appropriate



ID: Open doors leading down a white and glass hallway

Sample Text:
Reasonable
Accommodation
Request Pre-
Scheduled
Appointment

Sample Introduction of Self and Disability:

Dear (Names),

I am a patient at (Name of Provider). I have several conditions including diabetes that put me at risk for severe outcomes from COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html>. As you likely know, diabetes is a “disability” under the Americans with Disabilities Act because it substantially limits several major life activities, including the endocrine function.

Sample Text: Reasonable Accommodation Request Pre-Scheduled Appointment (cont.)

Sample Statement of Need for Accommodation:

I wear a mask to healthcare appointments, but no mask is 100% effective in preventing transmission of COVID-19 or other dangerous infectious diseases. Because of my disabilities, acquiring COVID-19 would threaten my health and well-being and potentially cause great harm.

I need and am requesting reasonable accommodations to have an equal opportunity to access healthcare as a disabled person. I am requesting accommodations that will mitigate the risk of my acquiring COVID or another disease while at my upcoming appointment on (Date of Appointment).

Sample Text: Reasonable Accommodation Request
Pre-Scheduled Appointment (cont.)

Sample Statement of Requested Accommodations:

Here are the accommodations that I think would work for me to be able to safely access my in-person healthcare appointment:

- That I be permitted to wait in a separate space by myself instead of in a waiting room with unmasked people
- That providers and staff wear high-quality N-95 masks while near me or interacting with me

Please let me know if (Provider) can implement these accommodations.

Sample Text: Reasonable Accommodation Request
Pre-Scheduled Appointment (cont.)

Sample Statement of Willingness to Communicate:

I think that the accommodations that I have identified are the simplest and most feasible ways for (Provider) to accommodate my disability. However, I am open to having a discussion about the best way for (Provider) to meet my needs during my upcoming appointment.

You may reach me at (Phone Number) or this email to discuss my request.

Thank you for your prompt attention to this time-sensitive matter,
(Your Name)

Next Steps if Your Request is Denied

Next Steps if Your Request is Denied

- Elevate and escalate within the healthcare organization
 - Contact high-level administrators, follow up with phone calls
 - Contact the general counsel for the healthcare provider
 - Use the State Bar of California “[Advanced Search](#)” function to find the names of counsel, type the first word of the name of the provider in the Firm Name field and hit Search
- Ask to file a formal grievance and then do so

Next Steps if Your Request is Denied (cont.)

- Refer healthcare organization to the Pacific ADA Center.

Pacific ADA Center Statement – June 27th, 2023

“Healthcare facilities, like hospitals and doctors’ offices, must follow ADA requirements. Some patients who visit healthcare facilities have disabilities that make them more likely to get diseases that are easily spread (such as COVID-19 or a lung virus like RSV). These patients also may be more likely to get very sick from these illnesses or take longer to get better.”

Next Steps if Your Request is Denied (cont.)

- Refer healthcare organization to the Pacific ADA Center.

Pacific ADA Center Statement – June 27th, 2023

“Healthcare facilities must provide reasonable accommodations to protect patients with these types of disabilities. Accommodations can include:

- telehealth (where it can be effective),
- a separate space to wait for appointments,
- masking by all staff located near the patient,
- better ventilation at the site by opening windows and running air filters, and
- other modifications.

If you have questions about your rights as a person with a disability or about your responsibilities as a healthcare provider, you can contact the Pacific ADA Center.”

Phone: 1-800-949-4232

Email: adatech@adapacific.org

Next Steps if Your Request is Denied (cont.)

File a formal complaint with an administrative agency

- U.S. Department of Health and Human Services, Office for Civil Rights
- California Civil Rights Department
- California Department of Managed Health Care
- California Department of Insurance

NOTE: These procedures can be slow or ineffective.

What's Next: Peer Support Office Hours

Join Senior and Disability Action and CIL for Peer Support Office hours

Peers will be available to discuss potential reasonable accommodations, workshop sample language, and support with other parts of the reasonable accommodation process.

- Join us on Thursday, July 6th, from 12:00 p.m. – 1:00 p.m. on Zoom.
- Register Here: <https://bit.ly/ADAPeerSupport>

What's Next: Survey on Experience with Accommodations in Healthcare

We want to hear from you regarding your experience requesting reasonable accommodations in healthcare!

- The short survey will better help our organizations and our communities understand what type of accommodations are being submitted, what type of accommodations are being met, and where/by which healthcare providers.
- Take the survey here: <https://bit.ly/ADAHealthcareSurvey>
- The survey will also be sent out after the workshop



Questions and Answers