Fighting for Safe Access in a Masks-Optional Healthcare Environment

A Workshop on Making Reasonable Accommodation Requests Under the ADA

June 27, 2023
<table>
<thead>
<tr>
<th><strong>Who We Are</strong></th>
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| **Emma Martin** (she, her)  
Community Engagement Program Manager  
Center for Independent Living (CIL) |
| **Beth Kenny** (they, them)  
Member  
Senior Disability Action (SDA) |
| **Claudia Center** (she, her)  
Legal Director  
Disability Rights Education and Defense Fund (DREDF) |
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
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”
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
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”)
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
"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
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)
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)
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
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
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.)


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.)


Major Life Activities = operation of major bodily function:

<table>
<thead>
<tr>
<th>immune system</th>
<th>bowel</th>
<th>cardiovascular</th>
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<tbody>
<tr>
<td>special sense</td>
<td>bladder</td>
<td>endocrine</td>
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<td>organs and skin</td>
<td>neurological</td>
<td>hemic</td>
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<tr>
<td>normal cell growth</td>
<td>brain</td>
<td>lymphatic</td>
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<td>digestive</td>
<td>respiratory</td>
<td>musculoskeletal</td>
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<tr>
<td>genitourinary</td>
<td>circulatory</td>
<td>reproductive</td>
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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**
- **Sensory Disabilities**:
  - Deafness
  - Blindness
- **Mobility Disabilities**
- **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
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
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
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 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 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 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.
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