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Accessibility in the Time of COVID-19: Unmasking Popular Misconceptions & Safely Maintaining Compliance

SUPPLEMENTAL MATERIALS

October 15, 2020

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U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office for Civil Rights

COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities

Does the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule allow a covered entity to share the name or other identifying information of an individual who has been infected with, or exposed to, the virus SARS-CoV-2, or the disease caused by the virus, Coronavirus Disease 2019 (COVID-19), with law enforcement, paramedics, other first responders, and public health authorities without an individual's authorization?

Yes, the HIPAA Privacy Rule permits a covered entity to disclose the protected health information (PHI) of an individual who has been infected with, or exposed to, COVID-19, with law enforcement, paramedics, other first responders, and public health authorities[1] without the individual's HIPAA authorization, in certain circumstances, including the following[2]:

- ***When the disclosure is needed to provide treatment.*** For example, HIPAA permits a covered skilled nursing facility to disclose PHI about an individual who has COVID-19 to emergency medical transport personnel who will provide treatment while transporting the individual to a hospital's emergency department. 45 CFR 164.502(a)(1)(ii); 45 CFR 164.506(c)(2).
- ***When such notification is required by law***. For example, HIPAA permits a covered entity, such as a hospital, to disclose PHI about an individual who tests positive for COVID-19 in accordance with a state law requiring the reporting of confirmed or suspected cases of infectious disease to public health officials. 45 CFR 164.512(a).
- ***To notify a public health authority in order to prevent or control spread of disease.*** For example, HIPAA permits a covered entity to disclose PHI to a public health authority

[1] Under HIPAA, "public health authority" means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate. 45 CFR 164.501 (definition of "public health authority").

[2] The HIPAA Privacy Rule limitations only apply if the entity or individual that is disclosing protected health information meets the definition of a HIPAA covered entity or business associate. This guidance provides examples of disclosures from certain types of entities, some of which are covered by HIPAA, and others that may not be. While the entities in the examples are covered under HIPAA, the examples are not intended to imply that all public health authorities, 911 call centers, or prison doctors, for example, are covered by HIPAA and are required to comply with the HIPAA Rules.

(such as the Centers for Disease Control and Prevention (CDC), or state, tribal, local, and territorial public health departments) that is authorized by law to collect or receive PHI for the purpose of preventing or controlling disease, injury, or disability, including for public health surveillance, public health investigations, and public health interventions. 45 CFR 164.512(b)(1)(i); *see also* 45 CFR 164.501 (providing the definition of "public health authority").

- ***When first responders may be at risk of infection.*** A covered entity may disclose PHI to a first responder who may have been exposed to COVID-19, or may otherwise be at risk of contracting or spreading COVID-19, if the covered entity is authorized by law, such as state law, to notify persons as necessary in the conduct of a public health intervention or investigation. For example, HIPAA permits a covered county health department, in accordance with a state law, to disclose PHI to a police officer or other person who may come into contact with a person who tested positive for COVID-19, for purposes of preventing or controlling the spread of COVID-19. 45 CFR 164.512(b)(1)(iv).
- ***When the disclosure of PHI to first responders is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public***. A covered entity may disclose PHI to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone they believe can prevent or lessen the threat, which may include the target of the threat. For example, HIPAA permits a covered entity, consistent with applicable law and standards of ethical conduct, to disclose PHI about individuals who have tested positive for COVID-19 to fire department personnel, child welfare workers, mental health crisis services personnel, or others charged with protecting the health or safety of the public if the covered entity believes in good faith that the disclosure of the information is necessary to prevent or minimize the threat of imminent exposure to such personnel in the discharge of their duties. 45 CFR 164.512(j)(1).
- ***When responding to a request for PHI by a correctional institution or law enforcement official having lawful custody of an inmate or other individual,*** if the facility or official represents that the PHI is needed for:
    - providing health care to the individual;
    - the health and safety of the individual, other inmates, officers, employees and others present at the correctional institution, or persons responsible for the transporting or transferring of inmates;
    - law enforcement on the premises of the correctional institution; or
    - the administration and maintenance of the safety, security, and good order of the correctional institution.

  For example, HIPAA permits a covered entity, such as a physician, located at a prison medical facility to share an inmate's positive COVID-19 test results with correctional officers at the facility for the health and safety of all people at the facility. 45 CFR 164.512(k)(5).

General Considerations: Except when required by law, or for treatment disclosures, a covered entity must make reasonable efforts to limit the information used or disclosed under any provision listed above to that which is the "minimum necessary" to accomplish the purpose for the disclosure. 45 CFR 164.502(b).

In some cases, more than one provision of the HIPAA Privacy Rule may apply to permit a particular use or disclosure of PHI by a covered entity. The illustrative examples below involve uses and disclosures of PHI that are permitted under 45 CFR 164.512(a), 164.512(b)(1), and/or 164.512(j)(1), depending on the circumstances.

ADDITIONAL EXAMPLES:

- **Example**: A covered entity, such as a hospital, may provide a list of the names and addresses of all individuals it knows to have tested positive, or received treatment, for COVID-19 to an EMS dispatch for use on a per-call basis. The EMS dispatch (even if it is a covered entity) would be allowed to use information on the list to inform EMS personnel who are responding to any particular emergency call so that they can take extra precautions or use personal protective equipment (PPE).

Discussion: Under this example, a covered entity should not post the contents of such a list publicly, such as on a website or through distribution to the media. A covered entity under this example also should not distribute compiled lists of individuals to EMS personnel, and instead should disclose only an individual's information on a per-call basis. Sharing the lists or disclosing the contents publicly would not ordinarily constitute the minimum necessary to accomplish the purpose of the disclosure (*i.e.,* protecting the health and safety of the first responders from infectious disease for each particular call).

- **Example**: A 911 call center may ask screening questions of all callers, for example, their temperature, or whether they have a cough or difficulty breathing, to identify potential cases of COVID-19. To the extent that the call center may be a HIPAA covered entity, the call center is permitted to inform a police officer being dispatched to the scene of the name, address, and screening results of the persons who may be encountered so that the officer can take extra precautions or use PPE to lessen the officer's risk of exposure to COVID-19, even if the subject of the dispatch is for a non-medical situation.

Discussion: Under this example, a 911 call center that is a covered entity should only disclose the minimum amount of information that the officer needs to take appropriate precautions to minimize the risk of exposure. Depending on the circumstances, the minimum necessary PHI may include, for example, an individual's name and the result of the screening.

Covered entities should consult other applicable laws (*e.g.,* state and local statutes and regulations) in their jurisdiction prior to using or making disclosures of individuals' PHI, as such laws may place further restrictions on disclosures that are permitted by HIPAA.

Resources

The CDC's National Institute for Occupational Safety and Health (NIOSH) has published a document that adds COVID-19 to its list of potentially life-threatening infectious diseases to which emergency response employees (EREs) may be exposed while transporting or assisting victims of emergencies, and for which the medical facilities receiving the victims of emergencies would be required by law to notify the EREs of the potential exposure for purposes of the EREs seeking necessary diagnosis or medical treatment. More information is available at https://www.cdc.gov/niosh/docs/2020-119/default.html?deliveryName=USCDC_10_4-DM24118.

Information about HIPAA Privacy and COVID-19 is available at https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf.

Information about disclosures of PHI to law enforcement officials is available in OCR's HIPAA Guide for Law Enforcement at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/special/emergency/final_hipaa_guide_law_enforcement.pdf.

Information about uses and disclosures of PHI for public health is available at https://www.hhs.gov/hipaa/for-professionals/special-topics/public-health/index.html.

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Workforce Bulletin

Insights on Labor and Employment Law

COVID-19 Accessibility Issues as ADA Turns 30

By Shira M. Blank & Joshua A. Stein on July 13, 2020

As summer kicks into high gear, and the Americans with Disabilities Act's 30th anniversary looms large at the end of this month, businesses in many jurisdictions are in the process of gradually reopening to the public.

And if the long and difficult spring wasn't trying enough, businesses now face yet another challenge — balancing maintaining the safety of employees and patrons against complying

with Title III of the ADA, and applicable state and local laws, which can significantly vary depending on the jurisdiction.

While in many ways the world keeps changing, some things never do — namely, the plaintiffs bar's continued pursuit of ADA lawsuits involving both brick-and-mortar locations and digital technology. Moreover, the COVID-19 pandemic has also brought new issues to the forefront — including the filing of some lawsuits alleging novel theories.

Below, we round up some of the many accessibility issues that businesses should keep in mind as they navigate through this new era in hopes of successfully reopening in the new normal.

With businesses increasingly relying on technology, lawsuits regarding accessible technology begin to surge again.

Through personal experience, most businesses are all too aware of the seemingly endless stream of lawsuits filed against companies for their alleged failure to provide websites that are accessible to individuals who are blind/have low vision or are deaf/hard of hearing. Although the number of federal lawsuits has arguably plateaued to some extent, the number of cases pursued in California state court, and through private demand letters, most certainly has not.

As plaintiffs counsel now argue that in this time of COVID-19 website accessibility is more urgent than ever, companies' risks of website accessibility lawsuits are greater than ever.

This risk is only heightened — particularly for those operating in California — following a slew of recent decisions, including one from the California Court of Appeals just last month in Martinez v. **San Diego County Credit Union** reversing a trial court's decision which found that a credit union's website, which allowed users to find its physical banking location, was not a place of public accommodation.

In its decision, the appellate court reaffirmed that under California state law — the Unruh Civil Rights Act — where a business has a nexus between its website and a physical place of public accommodation, it is required to make the website accessible to individuals who are blind or have low vision, which is consistent with the position taken by California federal courts when considering the same issue under Title III.

The obligation to provide accessible technology to individuals with disabilities goes beyond website accessibility. For example:

- Businesses must provide accessibility when relying upon the use of touchscreen devices. Depending upon the purpose of the device — e.g., for cashless methods of payment — this may involve substantial conformance with the Web Content Accessibility Guidelines 2.1 at Levels A and AA, but it might also involve providing audio-enabled guidance, braille/tactile keypads and/or swipe gesture-enabled operations, as well as mounting such devices at appropriate heights, within necessary reach ranges, and with sufficient clear floor space.
- If attempting to utilize touch-free methods for opening doors, businesses need to do so in a way that maintains access for individuals using mobility devices, such as wheelchairs — e.g., via the use of motion-sensor devices.
- For individuals who are deaf or hard of hearing, businesses should provide captioning or transcripts for videos, and consider policies for methods of providing access to captioning for older videos.

Lawsuits against businesses that require patrons to wear masks are a potentially ripe new area for litigation.

With an increasing number of jurisdictions now mandating that individuals wear face masks in public to help curb the spread of COVID-19, many businesses are also requiring customers to cover their faces as a safety measure when entering their physical locations for the same reason.

While many businesses generally can, and currently do, maintain facially neutral policies of refusing service to a customer who refuses to wear a face mask, businesses must also consider that there may be situations where a customer cannot wear a mask due to a legitimate health reason, such as a respiratory condition that does not allow them to have their breathing restricted.

In such an instance, we initially advised that the business should attempt to accommodate that customer in an alternative manner that would continue to protect its employees and other patrons, while also providing the customer with service — for example, providing curbside pickup, no-contact delivery or assistance via online store services.

However, the ability to establish uniform companywide policies for handling such situations has been made more challenging because many of the executive orders recently issued by state and local governments requiring masks in public accommodations often differ on how businesses should respond to individuals who cannot wear masks because of a disability or a medical condition.

As such, it is imperative that businesses be aware of the specific state and local rules in the jurisdictions in which they are operating that may create or limit their obligations, options or defenses if they deny service — and deviate from any baseline policies, as needed in specific jurisdictions. It is also more important than ever that staff working in these stores are trained regarding accessibility policies and proper sensitivity and etiquette so that they know how to respond when a customer says that they are unable to wear a mask, or require an accommodation.

The difficulties posed by these evolving obligations is clearly seen by some industrious plaintiffs counsel as ripe for litigation. In the last few months, we have begun to see lawsuits filed alleging that places of public accommodations have violated the ADA by refusing to accommodate customers with respiratory-related disabilities through the enforcement of a company policy requiring all shoppers to wear masks.

In these cases, the customers alleged that they are unable to wear masks due to an alleged disability — they walked into the store, an employee asked where their mask was, and when they responded that they could not wear one because of a medical condition, they were refused entry.

The plaintiffs assert that not only does this violate the ADA, but also state laws/guidance in those jurisdictions providing that businesses are required to allow individuals who cannot wear masks due to a medical condition to enter the premises, without the need to provide the business with documentation of their inability to wear a mask for medical reasons.

In a jurisdiction without such a restrictive mask order, a potential solution businesses may consider would be providing any patron who is unable to, or objects to, wearing a mask with alternative means of service — such as curbside pickup and free delivery.

Before assuming that this is sufficient to satisfy their obligations, however, businesses must be aware of the specific requirements of each jurisdiction in which they are operating, and

the need to modify their baseline policies and practices accordingly in order to remain in compliance with state/local orders which may impose additional restrictions/obligations.

Be sure to provide effective communication to individuals who are deaf/hard of hearing where both parties must wear masks.

Under Title III, businesses have an obligation to provide auxiliary aids and services necessary to achieve effective communication for individuals with disabilities. Due to the current need for employees and patrons to wear masks, businesses must consider the need for alternative methods of achieving effective communication for individuals who are deaf or hard of hearing and ordinarily rely on lip reading.

In order to deal with such circumstances, businesses should consider providing disposable pens and pads, markers and dry-erase boards sanitized between every use, or methods of electronic communication, and disinfecting any shared devices between uses.

Social distancing will impact businesses' obligations under the 2010 standards.

Further complicating the already daunting task of planning to safely reopen in a world of social distancing is the need to do so while also abiding by the technical obligations set forth by Title III's 2010 ADA Standards for Accessible Design. The requirements set forth in the 2010 standards play an integral role in maintaining accessibility for individuals using mobility devices and who are blind.

Maintaining Accessible Routes, Dining Locations, Service/Sales Counters and Parking

As businesses, and particularly, retailers and restaurants, modify their facilities in order to enforce social distancing, it is essential that they keep in mind that the 2010 standards require them to provide individuals who use mobility devices with accessible routes throughout the location, along with necessary maneuvering clearances and clear floor space.

Accordingly, steps taken to enforce social distancing — for example, queue lines and the use of stanchions — must be taken in a way that preserves the necessary dimensions set forth by the 2010 standards and does not create improper protruding objects. Similarly, such steps cannot result in the creation of protruding objects that might harm a person who is blind without the provision of detectable warnings.

And to the extent extra signage may be added to help provide wayfinding or inform patrons of safety rules, such information must be communicated in an alternative accessible format for individuals who are blind.

As restaurants prepare to open new outdoor dining areas and/or return to some level of interior dining under social distancing restrictions, they must still take into account the 2010 standards' requirements for the number of accessible dining locations that must be provided in areas in which customers are eating or drinking, including at the bar, and further, that those accessible dining spaces must be dispersed around different seating areas and along tables of different sizes.

Separate and apart from accessible dining surfaces requirements, the 2010 standards impose requirements for accessible (lowered) sales and service counters. Accordingly, where businesses seek to impose social distancing requirements that could require the temporary elimination of points of sale stations to increase separation at line queues — for example, restaurants' takeout counters or retailers' checkout locations — they must continue to provide services at those accessible counters which comply with the 2010 standards.

Along the same lines, businesses that provide parking to their patrons and are temporarily reducing the amount of parking provided to maintain social distancing must still abide by the 2010 standards' requirements for the number and location of accessible parking spaces, as well as van-accessible parking spaces. This is another area in which some states have additional unique requirements that businesses need to be aware of.

Elevators

Any business that requires employees and patrons to use elevators in order to reach its physical location, or parts of it, has likely examined how they can transport individuals to their locations safely and effectively while trying to maximize social distancing. Many have concluded that this requires limitations to the number of people who can use the elevators at any given time.

Such restrictive occupancy limits can have a significantly negative impact on wait times for patrons using mobility devices, who may have no choice but to use elevators as opposed to stairs. In these instances, businesses may wish to consider giving priority to patrons with mobility devices, and service animals, or designating an elevator at each bank as a priority

bank for such purposes. Additionally, any occupancy restrictions must be sure to comply with the applicable 2010 standards.

Conclusion

Many things in this day and age remain ever-changing and uncertain, however, the prevalence of ADA obligations and the risks of accessibility lawsuits remain a constant.

As we approach the ADA's 30th anniversary, and businesses adjust to the new normal by continuing to develop and adopt unique safety protocols, it is essential that they continue to account for accessibility throughout their planning processes and prepare to address their obligations under Title III and its state/local counterparts to avoid high legal risk exposure.

*A version of this article originally appeared in Law360: "**Key COVID-19 Accessibility Issues as ADA Turns 30**."*

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Workforce Bulletin

Insights on Labor and Employment Law

No Mask, No Service? ADA Considerations for Business Owners Requiring Face Masks in Retail Stores

By Jillian de Chavez-Lau & Joshua A. Stein on May 13, 2020

As numerous jurisdictions now mandate citizens wear face masks in public, many retailers have begun requiring customers to cover their faces as a safety measure to mitigate against the spread of COVID-19 among employees and fellow customers. Retailers intending to enforce a policy whereby it will turn away customers who refuse to wear face masks should be mindful of abiding by Title III of the Americans with Disabilities Act ("ADA"), which governs retails stores as a place of public accommodation.

May a Business Have a Policy Turning Away Customers Who Refuse to Wear Face Masks?

Likely yes, for the time being. The ADA generally prohibits eligibility/screening criteria that tend to exclude individuals based on a disability, unless the criteria are necessary for the business to operate safely in providing its goods and services. Those requirements must be based on actual risks and may not be based on speculation, stereotypes, or generalizations about people with disabilities. At this time, businesses concerned about the safety of their staff and customers should be justified in relying upon **guidance** from the Centers for Disease Control and Prevention (CDC), as well as state and local governments' orders, to justify policies forbidding customers without face masks from entering their stores. However, as guidance and state/local rules change regularly, retailers should regularly track developments so as not to rely on something that is no longer current and applicable. Moreover, as a best practice, and to avoid unwelcomed situations at the store, a business choosing to enforce such a policy should clearly communicate it to its customers (including in advance, *e.g.*, via its website).

May a Business Turn Away Customers Who Refuse to Wear a Face Mask, Even Without a General Policy Requiring Face Masks Be Worn in Stores?

It depends. The ADA permits a retailer to deny goods or services to an individual with a disability if their presence would result in a "direct threat" to the health and safety of others, but only when this threat cannot be eliminated by modifying existing policies, practices or procedures or permitting another type of accommodation. Whether a customer poses direct threat is an individualized, fact-sensitive inquiry. If a business does not have a clear policy of turning away customers who refuse to wear face masks, and turns away an individual for that reason, the business must be prepared to identify how/why that individual's specific, observable, condition/behaviors made them a "direct threat". For example, if the person exhibited generally recognized symptoms of COVID-19 (such as aggressive coughing compounded with profuse sweating or visible difficulty breathing), refusal of service without a mask on an individualized basis may be justifiable. Conversely, a business could be hard-pressed to successfully argue that a customer without a face mask posed a "direct threat" if he or she was asymptomatic or if there was some form of accommodation that would have allowed the person to be served (*e.g.*, allowing someone to wear a scarf instead of a mask). Upon refusing service on "direct threat" grounds, the store

should contemporaneously document its actions and justifications in the event their decision is later challenged.

What If a Potential Customer's Disability Is Uniquely Impacted Due to the Face Mask Requirement?

In limited circumstances, there could be a situation in which a customer cannot wear a face mask due to a legitimate health reason (*e.g.*, a person with a respiratory condition who cannot have their breathing restricted). In this case, pursuant to the considerations detailed above, a business may not need to alter their face-mask required policy, but in any event should attempt to accommodate that customer in an alternative manner that would continue to protect the store's employees and other customers while also providing service to the customer (*e.g.*, providing curb-side pick-up; no contact delivery; or assistance via online store services).

Face masks may also present communication barriers to individuals who rely on lip reading to communicate. The ADA requires retailers to provide effective communication to individuals with disabilities through the provision of auxiliary aids and services that are appropriate for the nature, length, complexity, and context of the communication and the customer's normal methods of communication. Tools such as communication via text messaging, a disposable pen/pad, or a sanitized dry erase board could strike the right balance between achieving effective communication and helping to curb the spread of COVID-19.
