How the ADA and HIPAA Intersect with COVID-19

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This WorkCare Fact Sheet describes key provisions of the Americans with Disabilities Act (ADA) and Health Insurance Portability and Accountability Act (HIPAA) in relation to the prevention and management of COVID-19 in the workplace.

The Americans with Disabilities Act of 1990 (and its amendments) prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. The ADA covers employers with 15 or more employees.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) offers protections to millions of American workers. Its basic function is to improve continuity of health insurance coverage, prevent discrimination, and ensure privacy and security in the handling of personal health information.

COVID-19 and the ADA

The ADA requires employers who obtain any type of medical information through inquiry or examination to maintain it in a confidential medical file and keep it separate from an employee's personnel file. According to the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces provision of the ADA, during the pandemic, employers may take employees' temperatures and ask about symptoms. They may also send employees with COVID-19 symptoms home without violating the ADA.

The ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity." Steps must be taken to ensure a mandatory diagnostic test is accurate and reliable, e.g., checking U.S. Food and Drug Administration emergency use authorizations granted to COVID-19 diagnostic tests.

An employer may lawfully choose to administer COVID-19 diagnostic testing to employees before they enter the workplace. This is because an individual with the virus would meet the definition of posing a direct threat to the health of others. However, antibody tests that indicate whether an employee had the virus do not meet this standard, and because Centers for Disease Control and Prevention (CDC) Interim Guidelines say antibody test results "should not be used to make decisions about returning persons to the workplace."

Regarding COVID-related physical or mental health job accommodation requests, the ADA allows employers to:

- Ask questions to determine whether a condition is a disability
- Discuss with the employee how the requested accommodation would allow him or her to keep working
- Explore alternative accommodations

- Request medical documentation, as needed

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation if it does not create undue hardship for the employer.

An employer may consider whether the pandemic causes "significant difficulty" in acquiring or providing certain accommodations. For example, it may be difficult to conduct a needs assessment or acquire assistive devices.

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An employer must weigh the cost of an accommodation against its current budget and constraints created by the pandemic when evaluating undue hardship.

Under the ADA, an employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols). However, when an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves, modified face masks for lip reading, gowns designed for individuals who use wheelchairs), or an accommodation under Title VII for religious reasons, the employer should discuss the request and provide a modification, as feasible.

For return to work after an absence, a doctor's clearance note may be requested. According to the EEOC, such inquiries are permitted under the ADA either because they would not be disability-related or, given the severity of the pandemic, would be justified under standards for disability-related inquiries of employees.

To learn more, visit What You Should Know about COVID-19 and the ADA, the Rehabilitation Act and OTHER EEO Laws.

HIPAA – Protected Health Information

To understand how HIPAA applies during the pandemic, it's important to first understand its provisions. HIPAA applies to covered entities and their

Protected Health Information in the Workplace

Under the Health Insurance Portability and Accountability Act, the following general guidance applies to an employee's protected health information (PHI) in the workplace:

1. *Documentation containing PHI must be stored in accordance with Occupational Safety and Health Administration (OSHA) regulations (29 CFR, Access to Employee Exposure and Medical Records) and the HIPAA privacy rule.*
2. *Medical records cannot be released to an unauthorized party without an employee's express written consent and authorization, except under certain circumstances that must be explained.*
3. *When an employee or designated representative requests access to a record, the employer must ensure that access is provided in a reasonable time, place and manner. If the employer cannot reasonably provide access to the record within 15 working days, the employer must advise the requestor about the reason for the delay and the earliest date when the record can be made available.*
4. *Coordination of health care services – including health care management of an individual through medical surveillance review, case management, disability review and onsite medical evaluation – is considered treatment under HIPAA regulations.*

In addition, security safeguards must be in place for processes that are administrative, technical and physical in nature. Electronic transmissions of medical information (fax or email) are confidential. A cover sheet or privacy notice should be used to identify the information contained in a transmission as confidential and remind the recipient that there may be serious legal consequences if information is mishandled.

Privacy rules require covered entities to make reasonable efforts to limit the amount of PHI that a physician or other medical professional uses or discloses to the minimum amount necessary to accomplish the purpose of the use or disclosure. This requirement does not apply when a physician discloses information to another provider, or when a physician requests information from another provider for treatment purposes.

Accordingly, the minimum necessary standard should not interfere with a qualified medical provider's ability to provide appropriate treatment. The minimum necessary standard also does not apply when a physician releases information: a) directly to a patient; b) pursuant to a patient's authorization; or c) for disclosures that are required by law or are necessary to comply with privacy rules.

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Facts About the ADA and HIPAA

ADA:

Under the ADA, a covered employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the employer's business. Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities.

Accommodations vary depending on the needs of the applicant or employee. An individual with a disability is a person who:

- *Has a physical or mental impairment that substantially limits one or more major life activities;*
- *Has a record of such an impairment; or*
- *Is regarded as having such an impairment*
- *A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job. An employer is allowed to ask questions about a disability in order to assess the need for and provide requested accommodations.*

HIPAA:

- *Provides opportunities for employees to enroll in group health plan coverage when they lose other health care coverage, get married or add a dependent.*
- *Prohibits discrimination in enrollment and premiums charged to employees and their dependents based on any health factors.*
- *Preserves the role of states in regulating health insurance, including the authority to provide greater protections than those available under federal law.*

Employees and their family members cannot be denied eligibility or benefits based on certain health factors. They also cannot be charged more than similarly situated individuals. Health factors include medical conditions, claims experience and genetic information.

business associates, not to employers in their capacity as employers.

Covered entities include:

- Health care providers who transmit personal health information in an electronic form
- Health plans, including insurers and health maintenance organizations
- Health care clearinghouses such as billing and repricing companies
- Business associates - a person or entity performing functions for or providing services to a covered entity

HIPAA provides administrative, technical and physical security safeguards to ensure the integrity, availability and confidentiality of protected health information (PHI), also referred to as "individually identifiable health information," that is held or transmitted by a covered entity

or business associate in any form, including electronic, paper or oral.

PHI includes information on an individual's physical or mental health or condition; the provision of health care to the individual; and payment for the provision of health care to

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the individual. It includes common identifiers such as name, address, birth date and Social Security number.

Privacy

The HIPAA privacy rule establishes national standards to protect individuals' medical records and other PHI. The rule sets limits and conditions on uses and disclosures that may be made to employers and others without employee authorization. The rule also upholds individual rights to obtain copies of health records and request corrections. Refer to 45 CFR Part 160 and Subparts A and E of Part 164.

The privacy rule does not protect an employee's employment record. An employer is legally allowed to ask for a doctor's note or other health information for sick leave, workers' compensation, wellness programs or health insurance purposes. However, if an employer asks an employee's health care provider directly for information about an employee, the provider cannot release that

information without the employee's authorization, unless other laws allow for its release, such as in the event of an emergency.

Security

The HIPAA security rule establishes national security standards for protecting health information that is held or transferred in electronic form. It describes technical and non-technical safeguards that covered entities must put in place to secure PHI. Refer to 45 CFR Part 160 and Subparts A and C of Part 164.

HIPAA and COVID-19

The COVID-19 pandemic is a public health emergency requiring specific interpretations of HIPAA. For example, an individual's health status related to testing positive for COVID-19 is considered PHI. However, covered entities may disclose this information to local, state and federal health authorities.

On April 2, 2020, the Office for Civil Rights, which enforces HIPAA provisions, announced it would exercise enforcement discretion and not impose penalties for violations of certain provisions of the HIPAA privacy rule against health care providers or their business associates for good faith uses and disclosures of PHI for public health protection purposes during the pandemic.

Officials said the OCR notification of enforcement discretion was issued to support federal agencies such as the CDC and Centers for Medicare and Medicaid Services, state and local health departments, and state emergency operations centers that need access to COVID-19 related data, including PHI. The privacy rule already allowed covered entities to provide this data; this notice gave business associates permission to share the data without risk of a HIPAA penalty.

On May 5, 2020, the OCR issued additional guidance reminding covered health care providers that the privacy rule prohibits giving the media and film crews access to facilities where patients' PHI will be accessible without the patients' prior consent.

To learn more, visit the OCR's COVID-19 webpage.

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