



## **GUIDANCE COMPLYING WITH COVID-19 MANDATE REQUIREMENTS**

### ***Understanding Confidentiality and Accommodation/Interactive Process***

In response to the coronavirus (COVID-19) pandemic, public authorities and owners have required their employees and contractors to take precautions against the spread of COVID-19, including requiring vaccinations, periodic testing, wearing of face coverings or facemasks, and/or social distancing. These mandates include the OSHA ETS mandate, 29 C.F.R. § 1910.501 *et. seq.*, the OSHA Healthcare ETS, 29 C.F.R. § 1910.502, *et. seq.*, the Minnesota HR/LR Policy #1446, and county and city mandates.

A business may be required to comply with a mandate entirely or partially, causing tremendous strain in determining how to comply with the different requirements and, ultimately, creating a tipping point where the business is compelled to adopt its own mandate to make the requirements consistent.

The different mandates cause further confusion about what applies and when. AGC has created a chart comparing the different mandates and their requirements, available online at <https://www.agcmn.org/safety/covid-19>.

This document provides background how to administer the confidentiality and accommodation requirements implicated by a mandate. It will try to highlight practical and legal considerations that, regardless of the mandate, may be best practices that can be applied for all mandates.

#### **Confidentiality**

The mandates likely will force an employer to gather or receive information from employees, including information that employees consider to be private and want reassurance that the employer will keep secret. The law also may require employers to create safeguards and protect the confidentiality of this information.

Specifically, the laws that may protect this information are the Americans with Disabilities Act (ADA), Occupational Safety and Health Act (OSHA), Minnesota Human Rights Act (MHRA), and common law on private information. (Although some may believe that mandate information is protected by the Health Insurance Portability and Accountability Act (HIPPA), HIPPA is unlikely to apply in this context.)

The COVID-19 mandates may require employers to gather and hold four types of information:

- *Vaccination and testing status.* This information most likely is medical information and should be treated as though it is a medical record.
- *Medical accommodation requests.* This information is based in medical or disability factors, and should be treated like other requests for accommodation made under the Americans with Disabilities Act.
- *Religious accommodation requests.* This information is not medical but should be treated as confidential.
- *Accompanying information.* In the course of the interactive process and other communications, more information may be gathered or communicated including references to confidential data.



Employers should create clear policies how employee confidential information will be handled to provide employees with reassurance, to help train and guide employees who may receive confidential information, and to promote compliance with legal duties.

### *Gathering information*

Employers should be able to ask about vaccination status and proof of vaccination to comply with a mandate. This request should be limited to 'need to know' information, specifically vaccination status. Some mandates may require a copy of the record proving vaccination and others do not. The employer needs to be aware of what is required under its mandate to verify vaccination status, and be wary of asking for more information.

Employers should not ask about an employee's general health information, religious convictions, or potential objections to receiving the vaccine. If an employee requires an accommodation for a medical or religious reasons, or suggests a need for an accommodation, then the employer should proactively provide the employee with the form to request an accommodation and/or the appropriate contact to make this request, and should document this act (for instance, send an email to the contact).

This process of gathering information should be confidential. For instance, pharmacies have lines with a gap to protect the confidential information of each person. Similarly, employers should create a system to assure confidentiality as the information is being collected. Once gathered, it must be retained in a manner that maintains the confidentiality, see below.

### *Documenting information*

The mandates differ on what information is required. Typically, a mandate requires some type of roster which is a spreadsheet that identifies the employee and provides the employee's vaccination status (fully, partially, unvaccinated per accommodation, unvaccinated otherwise), form of proof of status (e.g., reviewed vaccine card or attestation), and, optionally, whether the employee is performing work that is subject to a mandate. Some mandates require a copy of the proof of vaccination that may include date reviewed, date of shots, vaccine manufacturer, and who administered.

A recommendation is to use a code to identify employees on the spreadsheet. The employer can then either hide the column with the employee's true identity or remove the true identity and rely on the code. In this way, if the spreadsheet accidentally was shared or subject to eavesdrop, much of the confidential nature of the information would be preserved.

### *Retaining information*

Medical information should be kept in a secure and separate location from an employee's other files, and access should be restricted to those who have a legitimate business reason to review the information. We recommend that all information collected pursuant to a mandate be similarly stored—it simply creates confusion or mistakes to have different standards. Simplicity solves this concern. By "all information," we mean all information related to the mandate including vaccination status, proof of vaccination and its details, testing records, requests for any accommodation (not limited to medical accommodations), any information gathered during an interactive process, review and decision on a request for accommodation, and any notices or correspondences with the employee about complying with a mandate.

Note that the medical information could be considered a medical record under OSHA, which requires the employer to retain a copy for the tenure of the employee plus thirty (30) years. The current OSHA ETS



regulation says that this information is not subject to the general OSHA requirement and the information should be retained so long as the ETS remains in effect. This should be a topic that is watched.

### Sharing information

The primary point of information being confidential is that it is not shared. There are five instances when sharing information would be appropriate:

- *Internally.* The information may be accessed internally on a need-to-know basis with employees who have a legitimate business reason to learn the information.
- *As required by law.* For instance, there may be OSHA regulations requiring the employer to share the roster or records with an OSHA investigator. Also, the records may be subject to a court subpoena requiring disclosure under the terms of a court order.
- *Client.* Some clients, particularly healthcare clients, may have rigorous procedures to ensure that contractors are complying with the mandate and require employers to share information about its employees. This sharing may be allowed if additional protections are incorporated that protect the confidential information, specifically either (i) sharing the status without employee identity or (ii) requiring the client sign a confidentiality agreement to maintain the information as confidential and as the employer maintains it.
- *Other Third Party.* The employer may hire a third party to help administer the mandate or records, or there may be another third party who presents a legitimate need to review this information. This third party should sign a confidentiality agreement requiring the vendor to maintain the records as confidential and as the employer maintains them and/or the employee identifying information should be redacted.
- *By Waiver.* The employee may waive the confidentiality of the information and enable the employer to share it with, for instance, the employee's union or insurance provider.

When sharing the information, the employer should stamp the information as "Confidential" and may include a further statement, for instance with the client or third-party vendor, that the information is subject to a signed agreement protecting the confidentiality of the information.

Highly sensitive information sometimes obligates a paper trail, such as a sealed envelope that anyone who accesses must sign. A log is thereby created of who has accessed the information. Although this information is confidential, within confidentiality, there are degrees. This information is not important to national defense. Unless there is a reason to believe that the processes will not work in a company (or have been breached), these further steps should be unnecessary. A company should be mindful and review its processes. If there are lapses that cannot be addressed with training, heightened security measures should be considered.



### **Accommodation and the Interactive Process**

In the process of gathering information or even before, an employee may present a reason for not being able to comply with the mandate. Under the law, the employer may need to accommodate this request. The below procedure suggests an interactive process for the employer to consider the request and determine whether an accommodation is appropriate or available.

An accommodation is not an exception—an employee who gets an accommodation is not excused from the requirements of the mandate. Rather, an accommodation considers if the job can be reasonably changed or adjusted to permit the employee to work in a way that also preserves the intention of the mandate.

For instance, in other contexts, an employee could have a medical disability that prevents the employee from lifting items that weigh more than 30 pounds. A number of accommodations might enable the employee to work, such as assigning the employee to items that weigh less than 30 pounds or providing the employee with equipment that helps the employee lift the items. Or an employee with an eyesight disability may receive an accommodation of being given an anti-glare screen that enables the employee to access digital information.

The employer and employee engage in an “interactive process,” like a conversation, to figure out what, if any, accommodation works and is not unduly burdensome on the employer. Both parties must participate in the interactive process. Failing to engage in this dialogue in good faith could expose an employer to liability or the employee to not receive an accommodation.

Every step taken should be subject to confidentiality protocols.

#### **Step 1: Notice**

The first step is that the employer receives notice that an employee may need an accommodation. This notice can be the employee requesting an accommodation or the employer becoming aware of the need for an accommodation through a third party or by observation.

(The “observation” rule may be more common in other instances such as an accommodation for a disability, such as being unable to lift a certain weight and the employer realizes, by working the employee, that the employee has a disability. It is less clear what circumstances would make an employer aware through “observation” that the employee requires an accommodation. One example may be an employee returning from a leave for a condition that is known to create vaccination issues. More likely is a third party tells the employer. Regardless of odds, employers should train superintendents and other leaders to report requests for accommodation or steer other employees to the correct contact.)

The company policy and other employees should be clear how to make a formal request for an accommodation, including contact information and any information required to evaluate the request. There are two bases that may justify an accommodation to a mandate:

- *Medical condition:* A medical condition that prevents the employee from complying with a mandate, such as heightened anaphylaxis, or
- *Religious practice:* A sincerely held religious belief, practice or observance that prevents the employee from complying with a mandate.
  - Note that the “religion” accommodation is broader than traditional or organized religion. The law also recognizes a sincerely held practice or observance which means a moral or ethical



belief about right and wrong that is held sincerely with the strength of traditional religious views. For instance, an atheist with strong moral views (not political beliefs or doubts about the vaccine) could be a qualifying practice or observance. Or, veganism perhaps could rise to this level.

Employers should recognize that an employee may not know how to request an accommodation. The employer's COVID-19 mandate policy should explain the process, provide contact information, and/or forms for the employee to submit to request the accommodation.

We recommend to receive a request for an accommodation in writing. Creating a form can be helpful to ensure that the request identifies the need (medical or religious), provides information for whom to contact (for step 2), and requires a signed attestation that the information is true. There are examples of requests for accommodation forms on AGC of America's COVID website.

### Step 2: Information Gather

The employee's request for an accommodation does not mean that an accommodation is required or what the accommodation should be. The employer first can verify that the request is real and understand what accommodation may enable the employee to continue to work. The standards may be slightly different based upon why the request is made.

- **Medical condition:** An employer can request information from the employee's health care provider to verify the medical condition and to understand what accommodation may be appropriate.
  - There may be a dialogue, or back and forth questions and answers with the health care provider to understand the nature of the medical condition and whether a proposed accommodation would enable the employee perform certain job conditions or access to job benefits.
  - This dialogue should be in writing, not oral, and limited to an exchange of how to perform essential job functions. The employer should not delve into unrelated topics like the employee's prognosis. On the flip side, some medical conditions also may be temporal and it is relevant to ask if the condition will persist or be resolved to enable vaccination. After a period of rehabilitation or therapy, the accommodation may no longer be required. It may be safer to follow up periodically on the need for an accommodation rather than risk the waves.
- **Religious practice:** An employer can ask questions to verify that the employee's religious beliefs or practices are sincere.
  - The employer may ask questions to ensure that the religious belief is sincerely held and not a personal or political objection. For instance, the employer might ask for a letter or verification from the religion's spiritual leader or scholar (or, if the employee is unable to provide such documentation, why not). The employer also may ask softly how long the employee has been a member of this religious organization or belief.
  - Remember, if the request is founded on a sincerely held religious belief, that belief is protected by federal and state laws, and discriminating based upon that religious belief is illegal. Typically, an employer assumes that an employee's religious belief is sincere unless the employer has an objective and good faith reason to doubt that belief.



The employer should never assume that it knows what accommodation is best but should be open to the conversation to understand the employee's unique circumstances. Explore ideas and solutions that might work. For instance, understanding that an employee's medical condition is temporal might open an accommodation to providing more time to be fully vaccinated while submitting to weekly testing. Another employee may be unable to receive the vaccination at all but could be eligible to work on a job that is not subject to a vaccination mandate or could work on a job where the mandate permits a testing option.

The interactive process should focus on the issue driving the request for an accommodation and complying with the mandate. Focus on what is needed or relevant to evaluate the request for accommodation, and this should guide appropriate questions.

The employer also should consider the three phases of job duties: job application, job environment (how the work is done), and job benefits (such as access to training). Although a vaccination mandate is unlikely to affect all of these areas, an appropriate accommodation will allow the employee to participate in all of these phases.

### Step 3: Exploration

We include exploration as a separate step because an easy mistake is to overlook the need to be creative at times. Explore with the employee and the employee's medical or religious advisor potential accommodations. Often, the employee requests complete noncompliance and the employer considers rote solutions such as testing and social distancing.

The key to the interactive process is to encourage a conversation that gets to the root of what the employee needs and what the employer's policy needs. Typically, an employer should focus on essential job functions versus non-essential tasks. Like the classic Venn diagram, there often are more possible accommodations than initially considered.

Another problem is that each request may pose unique circumstances. The conversation needs to be handled on a case-by-case basis. Specifically, the employer should guard against treating one request the same as another.

For COVID-19 mandates, for instance, potential accommodations to consider may be periodic testing, face coverings, social distancing, modifying work schedule, changing how or where employees report to supervisors, or reassignment to another worksite, job or duties.

Finally, remember that although the employee may be entitled to an accommodation, the employee is not entitled to the specific accommodation requested. The employer may grant an accommodation that is different than what the employee requested but effective in terms of enabling the employee to perform the job and access the job's benefits.

### Step 4: Evaluation

The employer next reviews the accommodations for the following:

1. Does the accommodation fail to achieve the safety concerns of the mandate (for the employee and other workers on the jobsite)?
  - For instance, if the accommodation does not remove a significant risk of substantial harm to the health or safety of others, then it may fail. Note, the interactive process may require the



employer to confirm that no further accommodation, such as social distancing, could address this risk.

2. Is the accommodation unduly burdensome? What constitutes “unduly burdensome” is different for medical accommodations and religious accommodations:

- *Medical accommodation*—a medical accommodation looks to the Americans with Disabilities Act (ADA) that says an accommodation is not necessary if the accommodation creates a significant expense or difficult.
  - Whether an accommodation is significantly expensive or difficult is evaluated by the (i) the nature of the accommodation, (ii) the cost of the accommodation, (iii) the employer’s financial resources to afford the accommodation, (iv) the size of the business, and (v) the operations of the business. For instance, an accommodation that fundamentally alters the nature or operation of a business or is unduly expensive to a small business could be unduly burdensome.
- *Religious accommodation*—a religious accommodation looks to Title VII of the Civil Rights Act (and also looks to the Minnesota Human Rights Act) that does not require an accommodation that creates more than a de minimus cost, or a small cost.
  - For instance, although an accommodation like social distancing could have no cost, an accommodation such as weekly testing or job reassignment may trigger more than a minimal cost.
  - The interactive process may consider whether the employee can take steps (and will do so) to minimize the cost or burden.
  - An employer may be able to consider the cost of the accommodation in the context not only of how the accommodation will be administered, but also the overall cost of multiple employees who are seeking the same accommodation. In the aggregate, the accommodation may become unduly burdensome.
- Note, the two standards of “unduly burdensome” may be addressed by the Supreme Court. Some believe it likely that that the definition of a religious accommodation will be adjusted to match the medical accommodation.

3. Is there an objective and good faith basis to believe that the request for an accommodation is not legitimate? For example:

- The need for the requested accommodation would have applied before the COVID-19 related mandate, and the employee did not request an accommodation before.
- The employer is aware of statements made online or to others that the employee does not need an accommodation and intends to request one for personal or political reasons.
- The medical or religious advisors contradict the employee’s request.



**Step 5: Decision**

The final decision whether and what accommodation to grant should be made centrally to avoid inconsistent treatment and to ensure oversight of the interactive process.

If the answers to questions 1, 2 and 3 above are “no,” then the employer should grant the accommodation. If not, then the employee may be placed on unpaid leave or discharged.

The decision then should be communicated clearly to the employee in writing, including a process and timeframe for implementation.

**Final thoughts regarding accommodation**

The tricky thing with accommodations is mistaking a request, missing a step in the interactive process, or ending the interactive process too quickly. Communication is key to establish a procedure that accommodates employees’ conditions or beliefs while protecting the health and safety of others.

For more information about handling requests for accommodations, visit: [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](https://www.eeoc.gov/what-you-should-know-about-covid-19-and-the-ada-the-rehabilitation-act-and-other-eEO-laws)