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2022 Workers' Compensation Seminar

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NAVIGATING THE GOOD AND EVIL OF RETURNING TO WORK AFTER COVID-19

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Workers' Compensation in the **GARDEN** OF **GOOD**, AND **EVIL**?

ALFA INTERNATIONAL 2022 WORKERS' COMPENSATION SEMINAR

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JW MARRIOTT PLANT RIVERSIDE DISTRICT

SAVANNAH, GEORGIA

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Workers' Compensation in the **GARDEN OF GOOD, AND EVIL?**
ALFA INTERNATIONAL 2022 WORKERS' COMPENSATION SEMINAR

ADA, COVID and Return to Work

**Navigating the Good and Evil of Returning to Work
After COVID-19**



Federal and State Regulations

Americans with Disabilities Act (ADA)

Title VII of the Civil Rights Act of 1964

Workers' Compensation

OSHA Standards



Americans with Disabilities Act (ADA)

- The Americans with Disabilities Act (ADA) of 1990 protects EEs with qualifying disabilities from discrimination at work. The ADA places a legal duty on ERs to provide reasonable accommodations so that EEs with disabilities can perform their jobs and have equal access to employment opportunities.
- Disability is defined by the ADA as a person who **has** a physical or mental impairment that substantially limits one or more major life activities, a person who has a **history or record** of such an impairment, or a person who is **perceived** by others as having such an impairment.
 - A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working.
 - If an EE has a disability, they must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected by the ADA.



Americans with Disabilities Act (ADA)

The ADA regulates ERs' disability-related inquiries and medical examinations for all applicants seeking employment and current EEs, including those who do not have ADA disabilities.

The ADA prohibits covered ERs from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e., a significant risk of substantial harm even with reasonable accommodation).

The ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.



Prohibited Medical Inquiries

- ADA prohibits an ER from making **disability-related inquiries** and requiring **medical examinations** of EEs, except under limited circumstances.

An inquiry is “disability related” if it is likely to elicit information about a disability.

- I.e. Do you have a compromised immune system?
- Inquiring about flu symptoms would not be a disability related inquiry.

Medical Exam – a procedure or test that seeks information about an individual’s physical or mental impairments or health.

- Use of medical equipment, invasive, reveals impairment and interpreted by medical professional.



ADA Standards for Disability-Related Inquiries and Medical Exams

- ADA prohibits before a conditional offer of employment is made even if they are related to the job. 42 U.S.C. § 12112(d)(2)(A)
- ADA permits after conditional job offer is made if applies to all new EEs in the same job category. 42 U.S.C. § 12112(d)(3)(A)
- ADA prohibits after employment begins unless job-related and consistent with business necessity for active EEs.
 - “Business necessity”- ER has reasonable belief based on objective evidence that EE’s ability to perform essential job functions will be impaired by a medical condition or EE poses a direct threat due to a medical condition. 42 U.S.C. § 12112(d)
 - Reasonable belief based on objective evidence obtained, or reasonably available to ER, prior to making inquiry or requiring exam.
 - Information gathered must be kept confidential, on separate forms and in separate medical files. Treat as confidential medical record.



Direct Threat under ADA

- A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. 9 C.F.R. § 1630.2(r)
- If a disability poses a “direct threat” despite reasonable accommodation, EE is not protected by nondiscrimination provisions of ADA.
- EEOC’s regulations identify 4 factors:
 - *Duration of risk*
 - *Nature and severity of potential harm*
 - *Likelihood that potential harm will occur*
 - *Imminence of the potential harm*
- Cannot be based on subjective perceptions or irrational fears about a specific disability or disabilities.
- Examples: EE with contagious disease working in hospital; medication causes drowsiness in truck driver; heavy equipment operator with epileptic seizures.



Reasonable Accommodation

- A change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, a job's essential functions or enjoy equal benefits and privileges of employment.
 - Known limitations of applicants for employment and EEs with disabilities.
- Not an undue hardship
 - Results in significant difficulty or expense for ER, taking into account the nature and cost of the accommodation, the resources available to ER and operation of ER's business.
 - If accommodation would result in undue hardship, ER is not required to provide it, but still must consider other accommodations that do not pose an undue hardship.



Pandemic Planning

- Identify a pandemic coordinator or team with defined roles and responsibilities for preparedness and response planning.
- Include staff with expertise in equal employment opportunity laws.
- Include EEs with disabilities in planning discussions and ER communications concerning pandemic preparedness.



ADA Compliant Pre-Pandemic Survey

- In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:
 - If schools or day-care centers were closed, you would need to care for a child;
 - If other services were unavailable, you would need to care for other dependents;
 - If public transportation were sporadic or unavailable, you would be unable to travel to work; and/or
 - If you or a member of your household fall into one of the categories identified by the CDC as being high risk, you would be advised by public health authorities not to come to work.



ADA During a Pandemic

- When an EE returns from travel during a pandemic, must ER wait until the EE develops influenza symptoms to ask questions about exposure to COVID?
 - No because not disability-related.
- During a pandemic, may ER ask EEs who do not have symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable?
 - No because there is no objective evidence allowing for inquiry or examination.
 - If pandemic becomes more severe according to public health officials, ERs may have sufficient objective information to reasonably conclude that EEs will face a direct threat if they contract COVID. Then ER may make disability-related inquiries or require medical exams of asymptomatic EEs to identify those at higher risk of complications.
 - EEs with disabilities may request telework as a reasonable accommodation, even if ER does not have a policy allowing it. <https://www.eeoc.gov/facts/telework.html>



Question

- Before an influenza pandemic occurs, may an ER ask an EE to disclose if they have a compromised immune system or chronic health condition that the CDC says may make them more susceptible to complications of influenza?
 - A. Yes, I ask all my employees this before a pandemic.
 - B. No because it is likely to disclose the existence of a disability.



Question

- Are there ADA compliant ways for ERs to identify which EEs are more likely to be unavailable for work in the event of a pandemic?
 - A. Yes, an ER may make inquiries that are not disability-related, ie designed to identify potential non-medical reasons for absence (limited public transportation) on an equal footing with medical reasons (chronic illnesses that increase the risk of complications).
 - B. No, an ER can never ask if a EE will be unavailable in the event of a pandemic.



Question

- May an ER rescind a job offer made to a new hire based on the results of a post-offer medical if it reveals a medical condition that puts an EE at increased risk of complications from influenza?
 - A. Yes, we need to protect existing EEs from any direct threat posed by a new hire.
 - B. No, unless the new hire would pose a direct threat within the meaning of the ADA which could not reasonably be accommodated. I.e, safely perform essential functions, after considering among other things, imminence of risk; severity of harm; and availability of reasonable accommodations to reduce risk.



Vaccination Requirements - ADA

- May an ER covered by the ADA mandate that all EEs obtain a COVID vaccine regardless of medical conditions during a pandemic?
 - Generally, an ER may require its EEs to be vaccinated before returning to work subject to the protections of the ADA.
 - Under the ADA, an EE may be entitled to an exemption based on a disability that prevents them from taking the vaccine. If so, the ER must make a reasonable accommodation barring undue hardship [significant difficulty or expense].

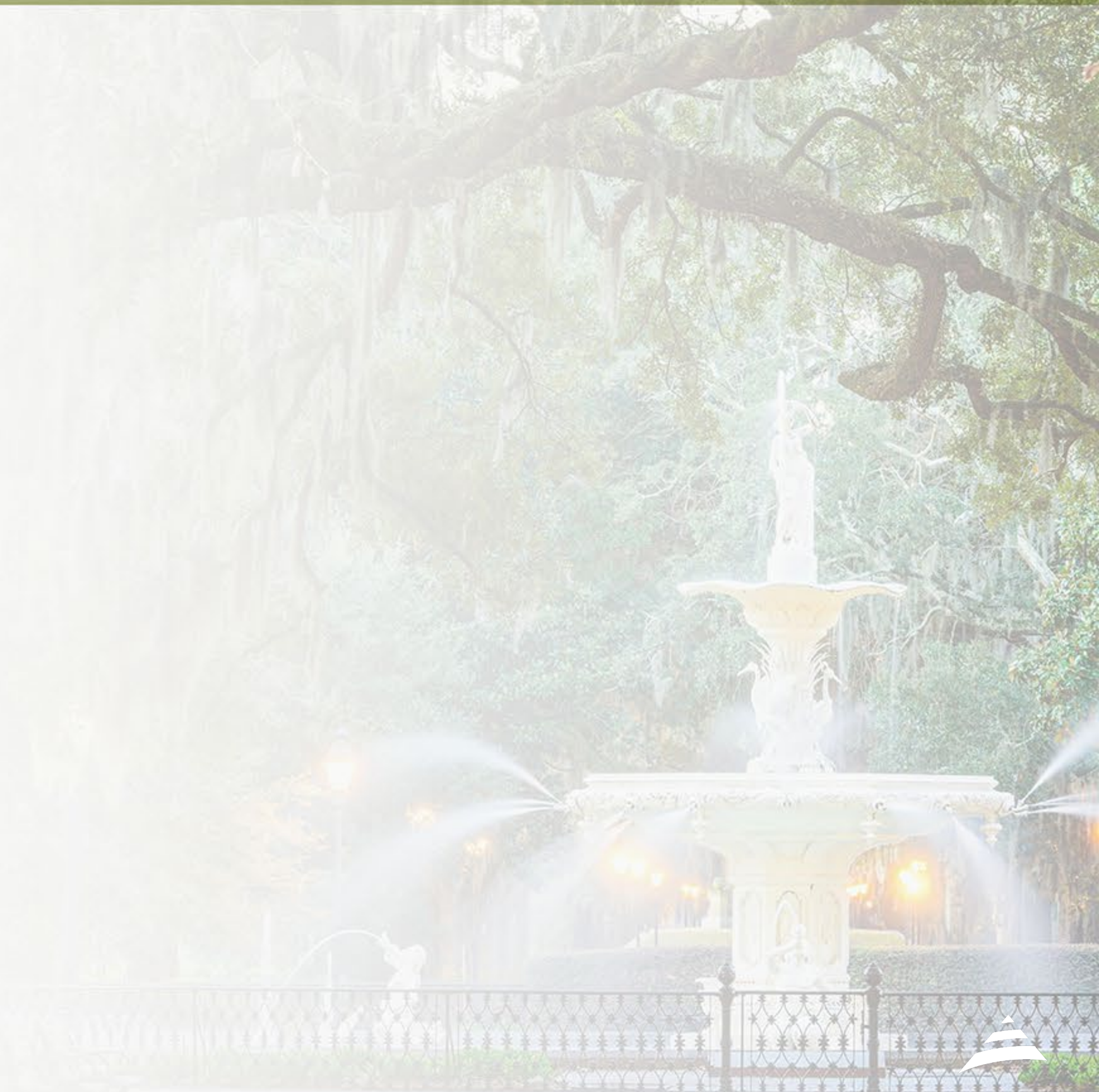
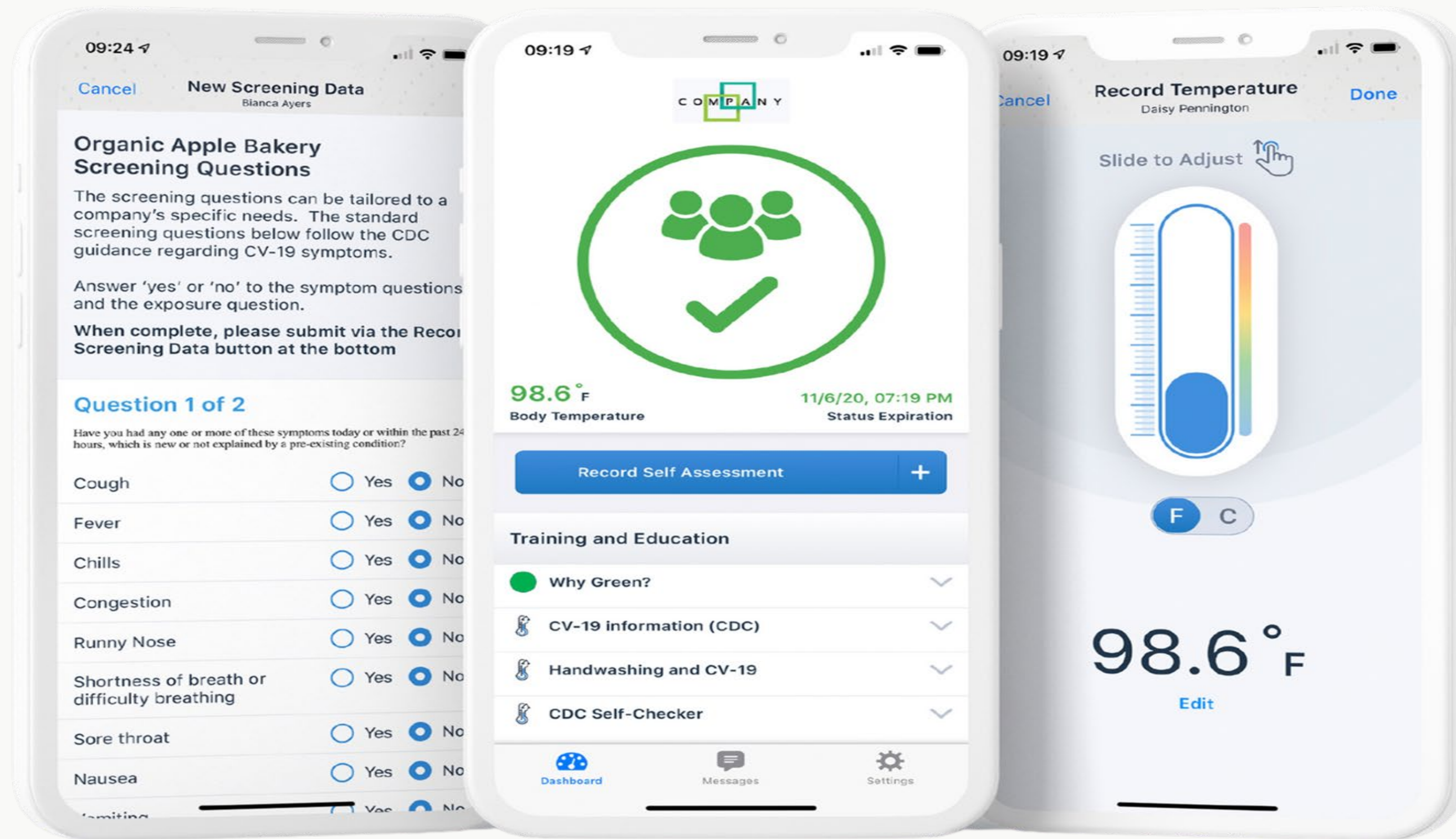


Vaccination Requirement – Title VII

- May an ER covered by the Title VII of the Civil Rights Act of 1964 compel all EEs to take a COVID vaccine regardless of their religious beliefs during a pandemic?
 - No, once an ER receives notice that EE's sincerely held religious belief, practice, or observances prevents from taking vaccine, ER must provide a reasonable accommodation unless it would pose an undue hardship (more than *de minimis* cost to the operation of EE's business).



Screening Data Management





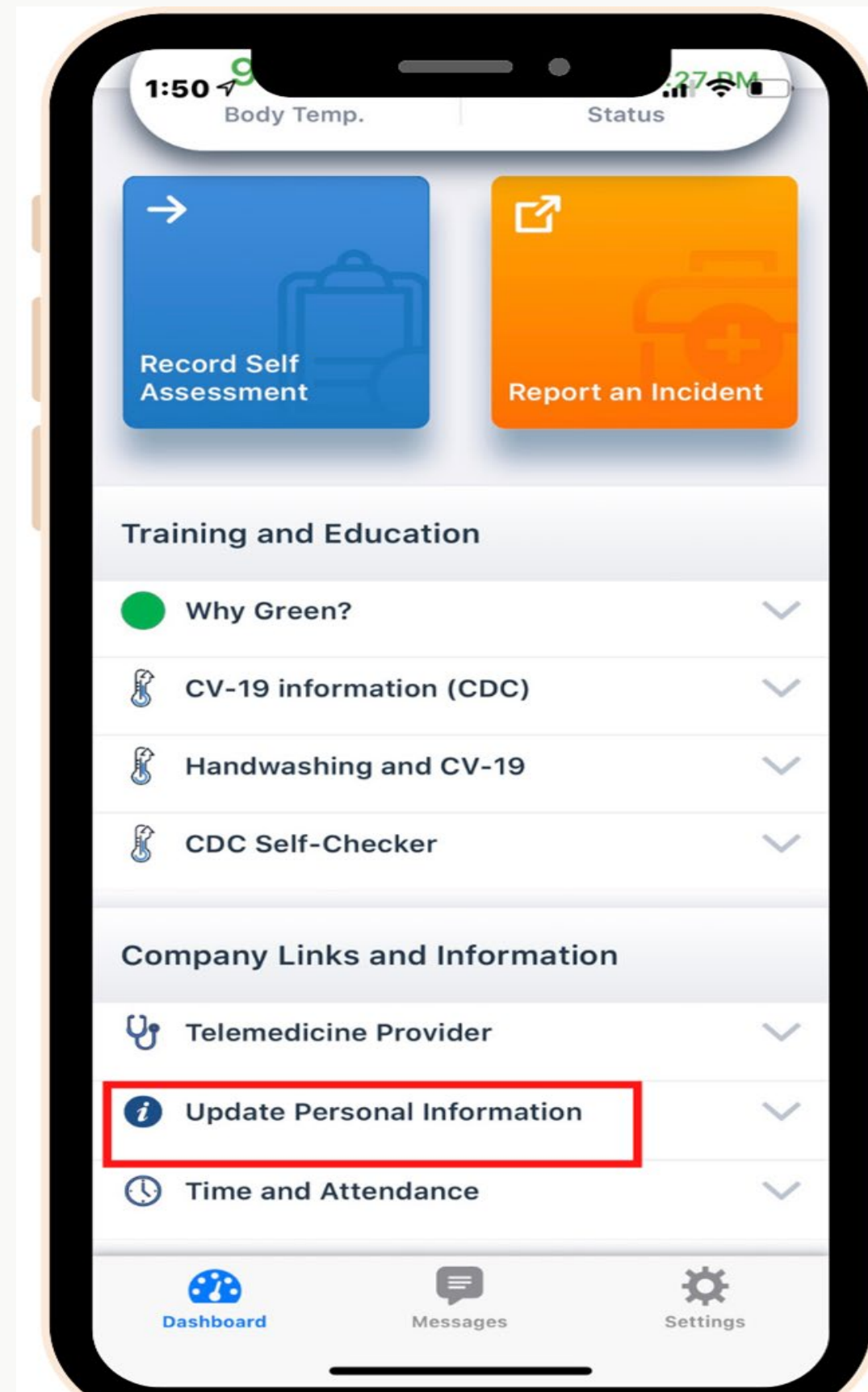
Vaccine Management

Users can report their vaccination status and upload their vaccination cards.

Organizations have the option to allow each user to self-report or assign a dedicated person to upload information.

The vaccination status is available for reporting and other decision-making purposes.

Vaccine Management is permission-based to protect users' privacy.





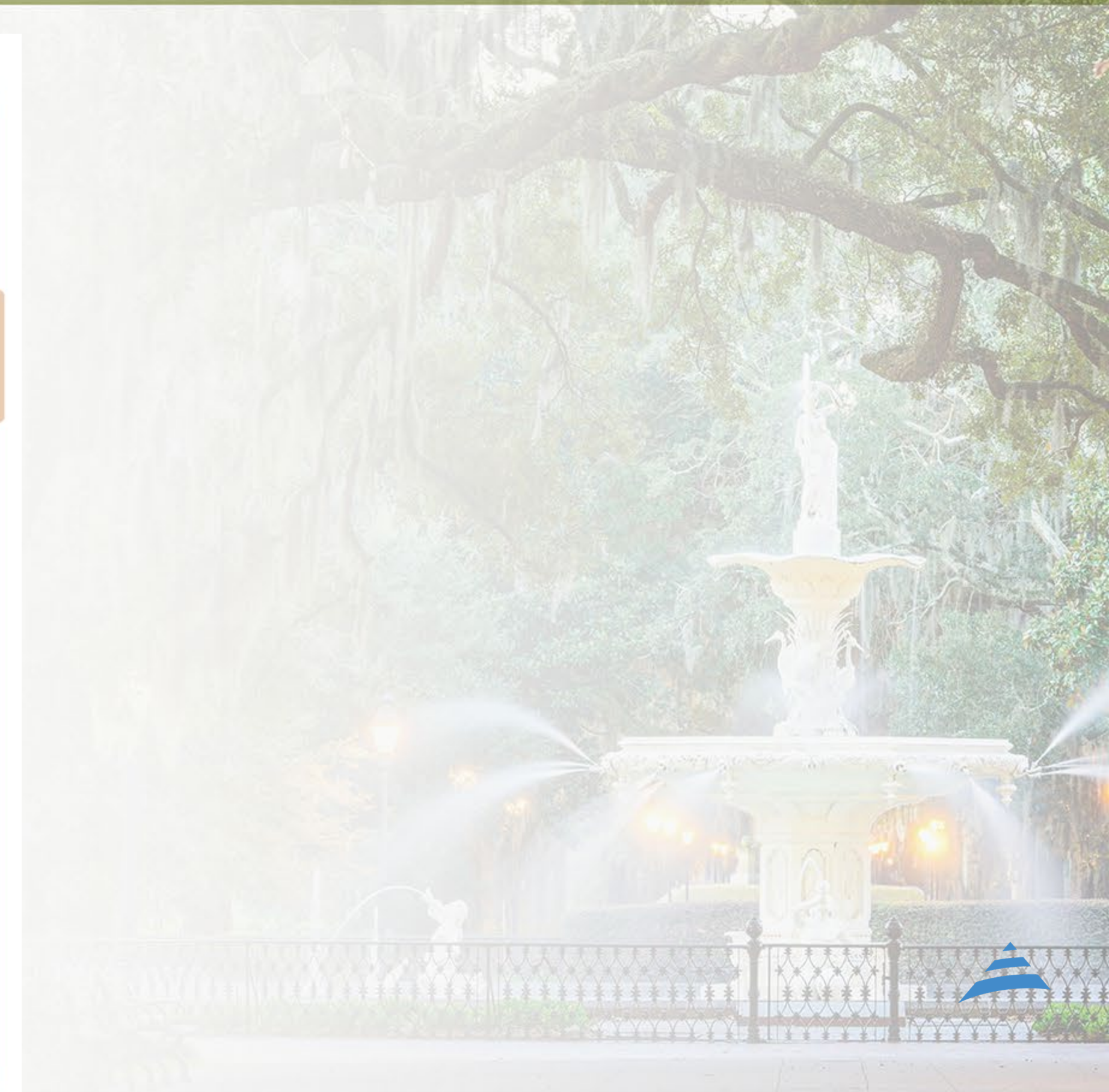
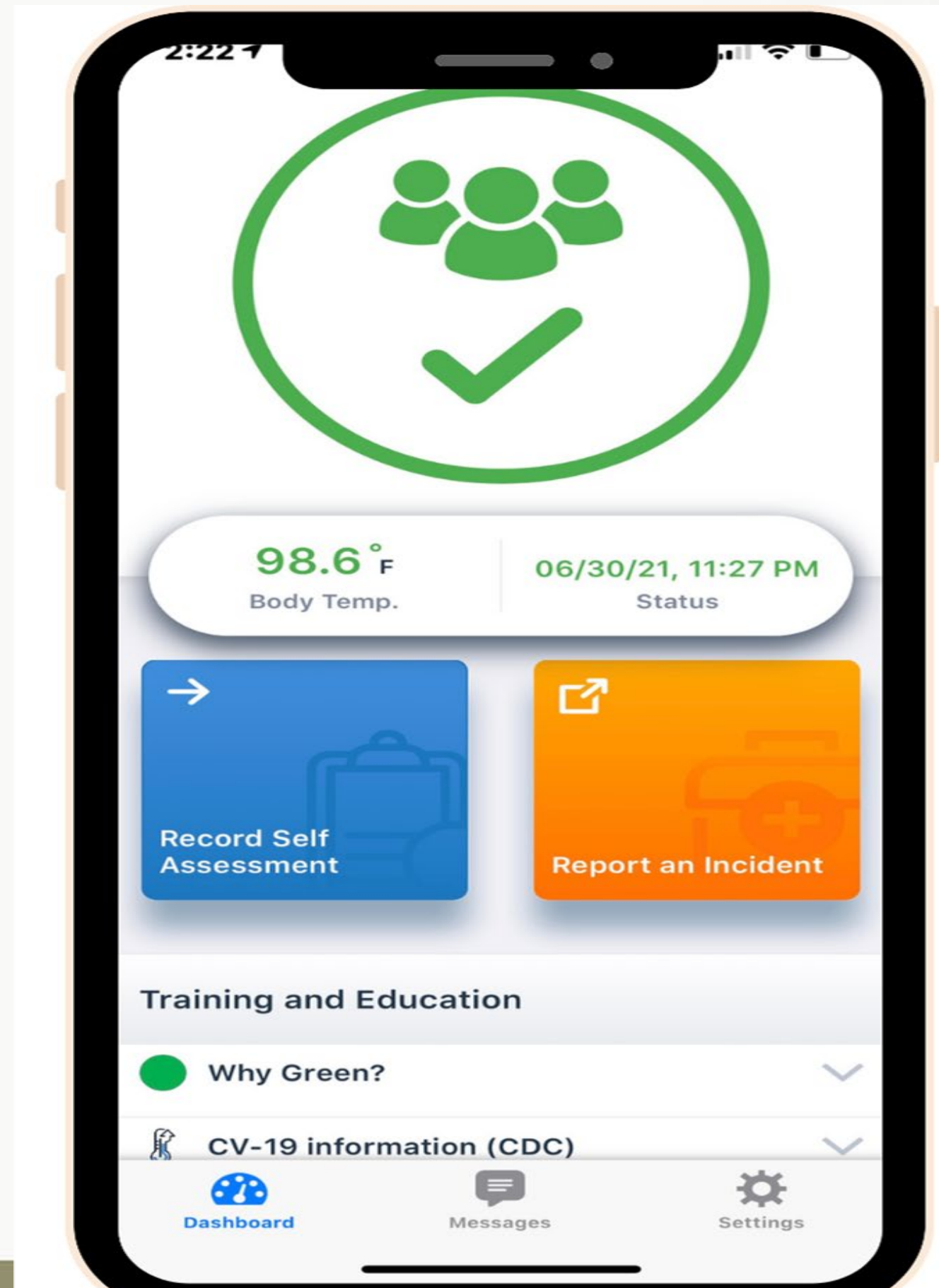
Incident Reporting

Users can quickly report incidents via their mobile device.

Users can record health and safety incidents, near misses and observations and attach pictures and other content.

Safety supervisors and team leaders can manage and report on incidents in real-time via the team app and dashboard.

Incident reporting is permission-based to handle different workflows and data visibility requirements.





Workers' Compensation Discrimination

- Thirty-seven states have a statutory provision that prohibits discriminatory or retaliatory conduct based on an EE's pursuit of or receipt of workers' compensation benefits.
- Out of the states that do not have a statutory provision prohibiting workers' compensation discrimination or retaliation, twelve states provide EEs, who are subjected to retaliation or discrimination because of their pursuit of or receipt of workers' compensation benefits, a claim under state common law



Post-Acute COVID-19 Syndrome or Long COVID

- Some individuals who had COVID-19 experience ongoing effects or lingering symptoms long after the initial infection.
- Both the U.S. Department of Justice and the U.S. Department of Health and Human Services jointly released guidance on July 26, 2021 clarifying when a COVID-19 infection rises to the level of a disability under the ADA.
- According to the agencies, a COVID long-hauler has a disability if their condition "is a 'physical or mental' impairment that 'substantially limits' one or more major life activities."



OSHA RECOMMENDATIONS AS OF AUGUST 13, 2021

- OSHA emphasizes that vaccination is the most effective way to protect against severe illness or death from COVID-19.
 - OSHA strongly encourages employers to provide paid time off to workers for the time it takes for them to get vaccinated and recover from any side effects.
 - Employers should also consider working with local public health authorities to provide vaccinations for unvaccinated workers in the workplace.
 - Finally, OSHA suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated.



CIVIL COVID CASES

- Exclusive remedy bars most civil court cases throughout the country.
 - EE and spouse alleged ER failed to maintain workplace in a safe condition, to implement a social distancing policy and COVID screening procedures which resulted in EE exposing spouse to COVID. Dismissed based on exclusive remedy. Kuciemba v. Victory Woodworks (Federal Court of Appeals for the Ninth Circuit)
 - Exclusive remedy and derivative injury doctrine (WC is exclusive remedy against third-party claims deemed derivative of EE's injury) did not bar COVID wrongful death case filed by EE after death of EE's spouse. Derivative injury is legally or logically dependent on the EE's injury and not merely causally linked. Derivative injury extends to non-EE claims when their own losses relate to the EE's injuries. Derivative injury did not apply because EE was seeking damages arising from an injury suffered by the EE, but rather, damages arising from the death of the EE's spouse. See's Candies v. Superior Court Los Angeles (2021, 2nd District Court of Appeal).
 - Exclusive remedy barred claims by a former detention officer against ER for negligent supervision and intentional infliction of emotional distress in connection with ER failure to maintain a safe and healthy work environment. Arnold v. Corecivic of Tennessee (2021, US District Court Southern District of CA)
 - Surviving spouse of EE who contracted COVID must file workers' compensation claim before suing ER in civil court. Ingino-Cacchioli v. Infinity Consulting Sols (2021, Superior Court of Delaware)
 - EE's contraction of COVID while receiving treatment for an industrial injury is compensable . Talavera v. Bob's Super Saver Inc. (2021, Kansas WCAB)
- Source: <https://www.ncci.com/Articles/Pages/COVID-19-Court-Cases-Insights.aspx#>



OSHA RECOMMENDATIONS AS OF AUGUST 13, 2021

- This guidance is intended to help employers and workers not covered by the OSHA's COVID-19 Emergency Temporary Standard (ETS) for Healthcare, to identify COVID-19 exposure risks in workers who are unvaccinated or otherwise at risk even if they are fully vaccinated (e.g., if they are immunocompromised).
- CDC Recommendations for fully vaccinated:
 - No need to quarantine unless EE has symptoms; monitor for symptoms 10 days after last close contact;
 - Wearing a mask in public indoor settings in areas of substantial or high transmission;
 - Choosing to wear a mask regardless of level of transmission, particularly if individuals are at risk or have someone in their household who is at increased risk of severe disease or not fully vaccinated; and
 - Getting tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wearing a mask in public indoor settings for 10 days after exposure or until a negative test result.



OSHA RECOMMENDATIONS AS OF AUGUST 13, 2021 CONTINUED

- Under the Americans with Disabilities Act (ADA), workers with disabilities may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19 if, for example, they cannot be protected through vaccination or cannot use face coverings. Employers should consider taking steps to protect these at-risk workers as they would unvaccinated workers, regardless of their vaccination status.
- CDC recommendations for unvaccinated or partially vaccinated:
 - Stay home at least 5 days after exposure; get tested at least 5 days after last close contact, monitor symptoms for 10 days.
 - Develop symptoms isolate, get tested, wear a mask for 10 days.
- Test positive regardless of vaccine status- symptoms isolate for 5 days or until fever free for 24 hours. No symptoms isolate 5 days; wear mask 10 days and if severely ill or immunocompromised isolate at least 10 days.



PROS AND CONS OF MANDATING VACCINATION

- F.D.A. has granted full approval to Pfizer-BioNTech, Moderna and Johnson & Johnson COVID Vaccines.
 - Pros
 - EEs will no longer need to be tested weekly or more frequently to work on site. Reducing lost time.
 - No need to quarantine unless have symptoms.
 - Mask mandates are relaxed or removed.
 - Means of protecting workforce from outbreaks.
 - Minimize contact tracing.
 - Fosters safe and healthy work environment while protecting vulnerable EEs.
 - Reduce EE anxiety about returning to office.
 - Cons
 - Workers who refuse to be vaccinated and internal strife among workers.
 - Discrimination or bias against unvaccinated prohibited.
 - Resignations or termination of EEs who refuse to be vaccinated.
 - CBA may prohibit.
 - EE ethical objection based on religious freedom.
 - Tracking and storing vaccine information, accommodations requests and increased costs.
 - Employee resentment.



FACT SCENARIO

On March 18, 2020, the Governor issued an Executive Order requiring most businesses to close as a result the COVID-19 pandemic.

As an essential business under the order, your facility remained open though most EEs chose to work from home. On June 15, 2021 the Governor lifted all restrictions allowing all businesses to reopen.

On January 1, 2022, you asked all EEs to return to work in the office, though you mandated that all EEs in the office be vaccinated once eligible. Any EE who refused the vaccine was terminated.



Questions

- Can you require EEs to be vaccinated to return to the work site?
- How do you handle EEs who are medically precluded from obtaining the vaccine?
- How do you deal with individuals who claim a religious exception to being vaccinated?
- How do you deal with new hires? Do you condition employment on vaccination?
- How do you handle ethical objections to vaccine not based on religious freedom?



CAL/OSHA COVID-19 PREVENTION EMERGENCY TEMPORARY STANDARD (ETS)

- Effective 1/14/2022; Expires 4/14/2022;
 - A permanent standard will likely be adopted during the March or April 2022 meeting.
 - ERs are now required to provide a readily-understandable, written notification that the EE may have been exposed **within one business day** of the exposure, without revealing any personal identifying information of the underlying COVID-19 case.
 - ERs may notify EEs via personal service, email, text message, or any other method that ensures receipt within the one business day deadline.
 - ERs must also provide COVID-19 testing at no cost to EEs during paid time to all EEs who had a close contact with a COVID-19 case in the workplace—including to fully vaccinated and asymptomatic employees.
 - ERs are *not* required to provide testing during paid time to EEs who have returned to work following a confirmed COVID-19 case and who remained free of COVID-19 symptoms.



CAL/OSHA ETS

- Exposed EEs who never developed symptoms may return to work:
 - (1) 14 days after the last known close contact;
 - (2) 10 days since the last known close contact if the EEs wear a face covering and maintain six feet of social distance from other EEs until 14 days have passed since the contact; or
 - (3) 7 days after the last known close contact if the EE tests negative for COVID-19 with a specimen taken at least five days after the last known close contact, and so long as such EEs wear face coverings and socially distance for 14 days.
- Similarly, asymptomatic EEs who recovered from COVID-19 within the last 90 days do not need to be excluded from work following a close contact if they wear a face covering and socially distance for 14 days.



CALIFORNIA DEPARTMENT OF PUBLIC HEALTH

- California Governor Newsom's Executive Order N-84-20 states that where the quarantine and isolation periods required by the ETS are longer than what is required by the California Department of Public Health's (CDPH) isolation and quarantine guidance, the CDPH guidance prevails.
 - The latest CDPH guidelines on isolation regardless of vaccination status mandate that:
 - EEs who test positive should isolate for at least 5 days, regardless of vaccination status, previous infection, or lack of symptoms. They may end isolation after 5 days if they have no symptoms or resolving symptoms and they test negative on the 5th day following exposure. Otherwise, they must isolate for 10 days.
 - Unvaccinated EEs who are exposed to COVID-19 must stay home for 5 days, and can end isolation if they are asymptomatic and test negative on the 5th day (but must continue to wear a face covering for 10 days following initial exposure). Otherwise, they must isolate for 10 days.
 - Exposed EEs who are vaccinated and booster-eligible but who have not yet received their booster shot can end isolation if they are asymptomatic and test negative 3 to 5 days from exposure (but must continue to wear a face covering for 10 days following initial exposure). Otherwise, they must isolate for 10 days.



CDPH ISOLATION

- EE unable to test with no or resolving symptoms isolate for 10 days.
- EE has fever must isolate until the fever resolves for 24 hours without medication.
- EE has symptoms other than fever may not return until symptoms resolve or after day 10 from positive test.



QUARANTINE FOR UNVACCINATED OR PARTIALLY VACCINATED (NO BOOSTER)

- EEs excluded from workplace 5 days after close contact. Test on day 5.
- EE may return after day 5 if symptoms resolved and negative test.
- EEs unable to test quarantine for 10 days.
- EEs must wear face covering for 10 days after exposure.
- EE with symptoms should exclude pending negative test.



CDPH VACCINATED AND BOOSTED NO QUARANTINE REQUIREMENT

- Test on day 5 with a negative result.
- Wear face covering around others 10 days, especially indoors.
- Test positive isolate per above.
- Develop symptoms, excluded from worksite pending negative test result.





CALIFORNIA DEPARTMENT OF PUBLIC HEALTH

- **Updates as of February 28, 2022:**
- Effective March 1, 2022 , the requirement that unvaccinated individuals mask in indoor public settings will move to a **strong recommendation** that all persons, regardless of vaccine status, continue indoor masking.
- Universal masking shall remain required in specified high-risk settings.
 - Public transit, emergency shelters and cooling/heating centers, healthcare settings, correctional facilities and detention centers, homeless shelters, & long term care facilities.
- After March 11, 2022, the universal masking requirement for K-12 and Childcare settings will terminate. CDPH strongly recommends that individuals in these settings continue to mask in indoor settings when the universal masking requirement lifts.
- Universal indoor masking requirement expired on February 15, 2022.
- Los Angeles indoor mask mandate expired March 4, 2022.



CALIFORNIA COVID SUPPLEMENTAL PAID SICK LEAVE

- Effective 2/19/2022
- 26 or more EEs
- Up to 80 hours of paid sick leave from 1/1/2022 to 9/30/2022.
- COVID, vaccine appointment, vaccine related symptoms, quarantine/isolation, or caring for family member who is quarantining/isolating.
- Cannot telework.
- ER may not retaliate or discriminate against EE requesting leave.
- Up to \$511 a day or a total of \$5110.