

California's New COVID-19 Vaccine (Non)Mandate and Testing Requirements

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On July 26, 2021, the California Department of Public Health (“CDPH”) issued a [State Public Health Officer Order](#) (“Order”) seeking to address the increase California is experiencing in positive COVID-19 cases. With infections of the COVID-19 Delta variant rising, Governor Gavin Newsom and State Public Health Officer Tomás Aragón issued the Order as an effort to reduce COVID-19 infections in California. However, contrary to some press reports, the Order is not really a vaccine mandate in any way, shape, or form. As this Advisory describes in detail, [in addition to a separate order for employees of the state](#), the Order applies to certain categories of health care and high-risk facilities, requires verification of workers’ vaccination status and compliance with masking guidelines, and imposes requirements for testing unvaccinated and incompletely vaccinated workers.

A brief overview of the Order is below.

Facilities/Settings Impacted by Order

The Order applies to [three broad categories of facilities](#) that California believes are at high risk for transmission of COVID-19. The three categories are:

1. Acute Health Care and Long-Term Care Settings
2. High-Risk Congregate Settings
3. Other Health Care Settings

Depending on an employer’s category, the Order imposes different testing and masking requirements.

Employer Responsibilities

All impacted facilities subject to the Order will be required to (1) verify vaccine status of all workers, (2) strictly adhere to current masking guidance under CDPH, and (3) establish testing requirements for unvaccinated and incompletely vaccinated workers.

Verification of Vaccine Status

For verification of vaccine status, an impacted facility will need to follow established modes of vaccination verification pursuant to the [CDPH's Vaccine Record Guidelines & Standards](#). All impacted facilities must also have a plan in place to track worker vaccination records, which must be made available, upon request, to local health jurisdictions for case investigation(s).

Masking Requirements

All impacted facilities must adhere to current [CDPH Masking Guidance](#), Cal/OSHA Aerosol Transmissible Diseases standards, and Emergency Temporary Standards requiring all unvaccinated workers be provided a respirator upon request. In addition to (or where Title 8 of the California Code of Regulations does not require) the use of respirators, the Order makes a distinction as to the requirements for each facility category.

With respect to *Acute Health Care and Long-Term Care* facilities, all unvaccinated or incompletely vaccinated workers who “work in indoor work settings where (1) care is provided to patients or residents, or (2) to which patients or residents have access for any purpose” must be provided with respirators at no cost to the workers. Workers must also receive instruction on how to properly wear the respirator and how to check the seal of the respirator. For *High-Risk Congregate Settings* and *Other Health Care Settings*, all unvaccinated or incompletely vaccinated workers must be provided U.S. Food and Drug Administration-cleared surgical masks that must be worn in indoor settings when workers are working with another person.

Testing Requirements

Testing requirements are similarly distinguished by facility category. For *Acute Health Care and Long-Term* facilities, asymptomatic unvaccinated or incompletely vaccinated workers are required to undergo diagnostic screening testing at least twice a week. For *High-Risk Congregate Settings* and *Other Health Settings* facilities, asymptomatic unvaccinated or incompletely vaccinated workers are required to undergo diagnostic screening testing at least once a week, with encouragement for more frequent testing. The testing requirement of the Order makes it clear that unvaccinated or incompletely vaccinated workers are not exempted from testing requirements even if a worker has a medical exemption to the vaccine.

Important Dates Employers Should Know

The Order will take effect on **August 9, 2021**, and all impacted California employer facilities must be in full compliance by **August 23, 2021**.

Questions and Complications Raised by the Order

Importantly, the Order raises several unanswered questions, particularly as to the costs of these requirements. First, the Order is not clear as to who is responsible for administering testing and for the costs associated with testing. The testing requirement is imposed directly on the worker, but the Order imposes the obligation to track testing

and report results on employers. Second, the Order is equally unclear on whether time spent being tested is to be paid or unpaid time. California needs to provide answers, but, as of now, the Order leaves these questions open for differing interpretations. Of course, it still is California, where courts are very employee friendly—especially when it comes to wage payment and expense reimbursement.

The answers to the above questions will surely lead to discussions (even possible bargaining) between California employers and unions. While both California employers and unions recognize the importance of vaccination and testing, the issue turns to who is responsible for paying the cost of testing and whether time spent being tested should be paid or unpaid time off.

There has been significant union objection and pushback regarding current (or possible) vaccine mandates throughout California and the rest of the country. The Order causes confusion for employers contemplating a vaccine mandate, and unions could reference the Order as an objection to an employer's vaccine mandate, emphasizing the fact that CDPH believes testing unvaccinated and incompletely vaccinated workers at least once a week (or twice a week in Acute Health Care and Long-Term Care settings) obviates the need for a vaccine mandate. Additionally, a similar order is expected from the Biden administration that will impact federal employees and its contractors.

What California Employers Should Do Now

- Contact legal counsel to see if the Order applies to your business, and if so, how to comply.
- Ensure that your business is able to plan for and meet the requirements imposed by the Order by the August 23, 2021, compliance date. This should include establishing written plans and procedures for compliance, adopting appropriate employment policies, engaging in employee education, reviewing potential union obligations where applicable, and ensuring resources and/or supplies are in place to meet testing and masking requirements.

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