

August 13, 2021

State Health Orders on COVID-19 Vaccination, Testing

The state recently issued multiple public health officer orders impacting vaccination for certain health care workers. [The first, issued July 26](#), requires testing of unvaccinated workers beginning no later than August 23. [The subsequent health order issued August 5](#) requires that employees be fully vaccinated or provide proof of religious or medical exemption by September 30. Taken together, this means that — on or before October 15 — the only workers who will be required to be tested weekly or twice weekly are those with a religious belief or qualified medical exemption from the full vaccination requirement.

To support members as they implement these two health orders, CHA has compiled the following frequently asked questions.

STATE PUBLIC HEALTH OFFICER ORDER OF JULY 26, 2021

GENERAL INFORMATION

1. What is required by the state public health officer order of July 26, 2021?

The state public health officer order requires that all unvaccinated workers in specified health care settings must:

1. Verify workers' vaccine status and document that verification.
2. Require unvaccinated staff to wear appropriate masks in indoor settings where care is provided to patients or where patients/residents have access.
3. Require unvaccinated workers to be tested at least once or twice per week, as specified in [All Facilities Letter \(AFL\) 21-27](#).

2. What employees/staff members are covered by the order?

The health order defines covered “workers” as “**all** paid and unpaid persons serving in health care, other health care or congregate settings who **have the potential for direct or indirect exposure to patients/clients/residents or SARS-CoV-2 airborne aerosols**” (emphasis added).

The order goes on to say that this includes, but is not limited to, nurses, nursing assistants, **physicians**, technicians, therapists, phlebotomists, pharmacists, students and trainees, **contractual staff not employed by the health care facility**, and persons not directly involved in patient care, but who **could be**

exposed to infectious agents that can be transmitted in the health care setting, like clerical, dietary, laundry, security, administrative, billing, and volunteer personnel.

Therefore, this order applies to not just employees, but also to contracted staff and vendors — including those who only work at the hospital for a short time. The order, however, does not apply to employees, staff, or vendors who do not have direct or indirect exposure to patients or occupational COVID-19 exposure, such as employees who work from home.

In short, as with similar health and safety regulations, the focus is not primarily on where someone works but rather their direct or indirect exposure to COVID-19.

3. [Where does the order apply?](#)

The public health officer order applies in **acute health care and long-term care settings** (including general acute care hospitals, skilled-nursing facilities, and intermediate care facilities), **high-risk congregate settings** (including adult and senior care facilities, homeless shelters, and correctional facilities), and **other health care settings** (including acute psychiatric hospitals, ambulatory surgery centers, clinics & doctors' offices, dialysis clinics, and hospice facilities). For purposes of this order, acute psychiatric hospitals are not included in the definition of “acute health care” settings.

The order does not apply to buildings that are not on the hospital's license.

4. [When does the order take effect? Is it mandatory?](#)

Yes, the order is mandatory. The order took effect on August 9 and hospitals must come into full compliance by August 23, 2021. In [FAQs](#) released on August 9, the California Department of Public Health (CDPH) states that, as the regulating entity for hospitals, it will enforce this requirement.

5. [Can employers exceed the health order's requirements?](#)

Yes. The health order sets a minimum standard. If an employer wishes to do so, it can exceed the standard, including requiring additional testing or mandating additional situations where a N95 or higher respirator must be worn.

DOCUMENTATION REQUIREMENTS

6. [Under the order, who is fully vaccinated? Who is unvaccinated?](#)

A “fully vaccinated” employee or staff member is one who is at least two weeks removed from receiving the second dose in a two-dose series (like Pfizer-BioNTech or Moderna) or is at least two weeks removed from receiving a single-dose vaccine (like Johnson and Johnson [J&J]/Janssen).

Vaccines approved by the [U.S. Food and Drug Administration \(FDA\)](#) or [World Health Organization \(WHO\)](#) — such as the Astra-Zeneca, COVISHIELD, Sinopharm, and Sinovac vaccines — are compliant with this health order's vaccine requirement.

An “unvaccinated” or “incompletely vaccinated” employee or staff member is one who meets one of the following criteria:

- Has not received any COVID-19 vaccine doses

- Has received a COVID-19 vaccine that is **not** approved by either the FDA or WHO
- Has not received the final dose of the vaccine series or is less than two weeks removed from their final dose
- Has declined to document their vaccine status

Natural immunity is not equivalent to vaccination. Even if an employee or staff member had a documented, confirmed case of COVID-19, they must be vaccinated with an approved vaccine or be treated as unvaccinated. CHA will clarify with CDPH whether testing is necessary for the 90-day period immediately following a documented case of COVID-19.

7. [What does the order require to document vaccination status?](#)

Only the following modes of documentation, pursuant to the [CDPH Guidance for Vaccine Records Guidelines & Standards](#), are permissible under the order:

- COVID-19 Vaccination Record Card issued by the Department of Health and Human Services or the Centers for Disease Control & Prevention (CDC), or the WHO Yellow Card, which includes name of person vaccinated, the type of vaccine provided, and date last dose administered)
- A photo of a Vaccination Record Card as a separate document
- A photo of the client's Vaccination Record Card stored on a phone or electronic device
- Documentation of COVID-19 vaccination from a health care provider
- A digital record that includes a QR code that, when scanned by a SMART Health Card reader, displays to the reader the client's name, date of birth, vaccine dates, and vaccine type. Note: A technical correction was made to this paragraph on August 9, 2021, to clarify that valid SMART Health Cards issued by other states or health care providers are sufficient as proof of vaccination. That correction deleted the requirement that "The QR code must also confirm the vaccine record as an official record of the state of California."
- Documentation of vaccination from other contracted employers that follow these vaccination records guidelines and standards.

The California Immunization Registry cannot be accessed by a hospital to verify the vaccination status of an employee or staff member, and therefore should not be used to document vaccination status.

8. [Do hospitals need to verify the vaccination documentation?](#)

The order states that, in the absence of knowledge to the contrary, a facility may accept the documentation presented as valid.

9. [Do hospitals need to report vaccine verification with CDPH?](#)

No. At this time, hospitals are only required to document vaccine verification. They do not need to report vaccine verification results to CDPH, although hospitals do need to keep this information on file and make it available to CDPH and local public health officers on request.

MASKING AND TESTING

10. Is masking and testing necessary for unvaccinated or incompletely vaccinated workers?

Yes. Under the order, all unvaccinated employees and staff must be tested regularly and wear either a surgical mask or a respirator (more details below).

11. Which masks are necessary for unvaccinated staff?

Under both the order and the Cal/OSHA COVID-19 Emergency Temporary Standard (ETS), all unvaccinated workers working in indoor settings **must be provided with a respirator**. While the respirator does not need to be worn, **a surgical mask must be worn**, and the order encourages the use of respirators in patient areas and areas where patients and residents have access.

The Aerosol Transmissible Disease (ATD) Standard applies in cases where an occupational exposure to COVID-19 (or any other aerosol transmissible disease) is reasonably anticipated to create an elevated risk of contracting COVID-19 when protective measures are not taken. **Under the ATD Standard, full personal protective equipment (PPE), including a N95 respirator or higher, is required for all health care employees and staff to minimize exposure to COVID-19.**

For the purposes of the ATD Standard, an “elevated” risk is a risk higher than what is considered ordinary for employees having direct contact with the general public outside of health facilities. Employers covered by this standard must identify employees who have occupational exposure so that appropriate protective measures can be implemented as required.

12. What is the testing cadence for unvaccinated employees/staff?

[AFL 21-27](#) requires the following testing cadence in general acute care hospitals and skilled-nursing facilities:

- Covered workers who are unvaccinated or incompletely vaccinated and work more than one shift per week must undergo **twice-weekly** SARS-CoV-2 diagnostic screening testing.
- Covered workers who are unvaccinated or incompletely vaccinated and work no more than one shift per week must undergo **weekly** SARS-CoV-2 diagnostic screening testing. The testing should occur within 48 hours of their shift.
- Covered workers who are unvaccinated or incompletely vaccinated and work less often than weekly must undergo SARS-CoV-2 diagnostic screening testing. The testing should occur within 48 hours of **each shift**.
- Covered workers who are unvaccinated or incompletely vaccinated and do not work in areas where care is provided to patients, or to which patients do not have access for any purpose, must undergo **weekly** SARS-CoV-2 diagnostic screening testing.

Both the order and the AFL are silent on the timeline by which test results must be available to the hospital or communicated to an employee. Unless symptomatic, an employee can work while the test results are pending. Hospitals should create a process for vendors and non-employed staff to transmit their test results to the hospital for contact tracing purposes.

[AFL 21-29](#) requires the following testing cadence in high-risk congregate settings and other health care settings, including acute psychiatric hospitals and ambulatory surgery centers:

- Covered workers who are unvaccinated or incompletely vaccinated and work one or more shifts per week must undergo **weekly** SARS-CoV-2 diagnostic screening testing. For workers who work only one shift per week, the testing should occur within 48 hours of **each shift**.
- Covered workers who are unvaccinated or incompletely vaccinated and work less often than weekly must undergo SARS-CoV-2 diagnostic screening testing. The testing should occur within 48 hours of **each shift**.
- Covered workers who are unvaccinated or incompletely vaccinated and do not work in areas where care is provided to patients, or to which patients do not have access for any purpose, must undergo **weekly** SARS-CoV-2 diagnostic screening testing.

13. Are powered air purifier respirators (PAPRs) permitted under the order?

Under the ATD Standard, hospitals are permitted to use PAPRs as protective equipment against aerosol transmissible diseases in certain contexts. For example, under the ATD Standard, a PAPR is required for employees performing intubation and other high-risk aerosol-generating procedures. However, both the CDC and Cal/OSHA discourage the use of traditional PAPRs in the surgical theater, unless the exhaust air is appropriately filtered. Therefore, while PAPRs are permitted under the ATD Standard and the order, hospitals should consult the manufacturer's instructions to ensure that the PAPR is appropriate for its intended context.

14. Does the order require fit testing of respirators?

No. The health order requires that the employer must instruct the worker in how to properly wear the respirator and how to perform a seal check according to the manufacturer's instructions, if this has not already occurred.

However, the ATD Standard does require all employees who need to don appropriate respirators are fit tested and trained in the use of their respirator.

15. Are the Cal/OSHA guidelines on the reuse of N95 respirators still in effect?

No. Due to an increase in the availability of N95 respirators, Cal/OSHA has suspended its guidance permitting certain strategies to extend the supplies of respirators. Hospitals must follow manufacturer instructions on the use of N95 respirators.

16. Is masking and testing necessary for fully vaccinated staff?

CDPH stated verbally on July 28 that masks are required for all individuals in health care settings, including fully vaccinated staff. The following **individuals** are exempt from wearing masks at all times:

- Children younger than 2 years old. Very young children must not wear a mask because of the risk of suffocation.

- Those with a medical condition, mental health condition, or disability that prevents wearing a mask. This includes those with a medical condition for whom wearing a mask could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a mask without assistance.
- Those who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication.
- Those for whom wearing a mask would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.

Under the order, testing is not required for vaccinated workers. **However**, [AFL 20-88.2](#) recommends weekly routine diagnostic screening testing of workers, regardless of vaccination status, unless 70% or more of the health care personnel are fully vaccinated.

17. Are face coverings required while eating or using a break room?

Under the Cal/OSHA ETS, face coverings must be worn in break rooms, but they can be removed for eating and drinking.

18. What COVID-19 tests are required by the health order?

Under the public health order, only PCR (molecular) or antigen tests can be used to test unvaccinated workers. Antibody tests cannot be used. The PCR (molecular) or antigen test used must either have FDA emergency use authorization or be operating per CMS' Laboratory Developed Test requirements.

CDPH has stated that hospitals may accept the results of tests performed elsewhere. For example, if a physician has privileges at two hospitals, the physician does not need to be tested twice weekly at each hospital. The physician can be tested anywhere and provide the results to both hospitals.

19. Can an employee decline a COVID-19 test? What if their reason is due to a sincerely held religious belief?

Under the Americans with Disabilities Act, a mandatory medical test is permissible if the test is “job related and consistent with business necessity.” In its guidance on COVID-19 testing, the Equal Employment Opportunity Commission (EEOC) finds that, due to the current circumstances of the COVID-19 pandemic, testing is permissible as a business necessity and employees can be barred from the premises if they refused to be tested.

Unless that employee has COVID-19, needs to quarantine due to COVID-19, is securing a COVID-19 vaccine, or is caring for someone with COVID-19, the employee would not be owed any COVID-19 Paid Supplemental Sick Leave.

However, if an employee asks for reasonable accommodation, either due to a sincerely held religious belief or a disability, the hospital must follow its regular process as for any other accommodation. See [Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 \(9th Cir. 1984\)](#) and [Robinson v. Children's Hosp. Bos., Civil Action No. 14-10263-DJC \(D. Mass. Apr. 5, 2016\)](#).

20. What are the privacy considerations around reporting COVID-19 test results?

For hospital employees: A hospital may use COVID-19 test results from its own employees as needed to comply with this order, to fulfill communicable disease reporting requirements, to make decisions about fitness for duty or eligibility for leave, and for workers' compensation purposes.

For individuals who are not hospital employees: If a hospital tests an individual who is not its own employee — for example, a vendor's employee or a non-employed physician — the hospital may not disclose the test results to that individual's employer without the individual's written authorization. Hospitals should either (1) have the employee sign an authorization form that allows the hospital to release the test results to the individual's employer or (2) require the individual to get tested elsewhere and bring or send the results to the hospital.

21. Who pays for the masks? Tests?

Under state law, employers have a responsibility to provide all necessary PPE for their employees to safely perform their jobs. Additionally, both the Cal/OSHA ETS and ATD Standard explicitly require that employers provide and require the use of necessary face coverings. Therefore, employers must provide N95 respirators to unvaccinated employees, require the use of N95 respirators where the ATD Standard applies, and require the use of provided surgical masks in patient care settings or areas where patients have access.

For COVID-19 testing, the order states that employees have their choice of either PCR or antigen tests. AFL 21-27 provides that general acute care hospitals can provide either test to health care personnel to meet this requirement. If an employee declines the test offered by the hospital and instead chooses to self-procure their own test, CHA believes that the hospital is not liable to pay for the self-procured test or the staff time involved to obtain it. However, CHA advises hospitals to consult with their labor counsel for further guidance on this point.

CDPH [FAQs](#), released August 9, also indicate that health plans are obligated to cover COVID-19 testing.

Additionally, CHA encourages hospitals to provide the COVID-19 tests during working hours whenever possible, in order to prevent potential claims of "off the clock" working due to the need to test. If that is not feasible, consult with your labor counsel to develop policies on at-home tests or tests conducted outside of the workplace.

STATE PUBLIC HEALTH OFFICER ORDER OF AUGUST 5, 2021

22. What was the state public health officer order of August 5, 2021?

The state public health officer order **requires** that, on or before September 30, 2021, all employees, staff, and vendors who have access to patients or access to areas where patients have access have had either their first dose of a one-dose regimen or the second dose of a two-dose regimen, **unless** the employee, staff, or vendor has either a medical reason or sincerely held religious belief.

23. Does the August 5 health order apply to the same types of health facilities as the July 26 health order?

With the exception of dental offices, which are covered only by the July 26 order, both health orders apply to the same group of facilities.

24. Does the August 5 health order apply to the same group of workers as the July 26 health order?

Yes. If a worker has access to patient or areas where patients have access, the health order of August 5 applies.

25. How does the August 5 health order interact with the July 26 health order?

While CDPH has yet to issue an AFL for the August 5 health order, the order explicitly states that the July 26 order is still in effect. Therefore, it is likely that CDPH will view these orders as complementary:

- The July 26 order requires that health facilities ascertain and document the vaccine status of their employees, staff, and vendors, and mandates testing and masking for the unvaccinated workers, starting August 23, 2021.
- The August 5 order states that these unvaccinated workers must receive their final dose of vaccine by September 30, 2021, unless they have either a health or religious exemption. If an unvaccinated worker does qualify for an exemption, the health facility must continue to require appropriate masking and testing as required under the July 26 health order.

26. Under the health order, what documentation is required of a worker who wishes to qualify for a health exemption?

Under the health order, the worker must provide a written statement signed by a physician, nurse practitioner, or other licensed medical professional practicing under the license of a physician stating that the individual qualifies for the exemption. The statement should **NOT** describe the underlying medical condition or disability.

The medical exemption should also indicate the probable duration of the worker's inability to receive the vaccine (or if the duration is unknown or permanent, so indicate).

27. Under the health order, what documentation is required of a worker who wishes to qualify for a religious exemption?

The health order does not contain any specific requirements for workers seeking religious exemptions.

28. Who determines whether a worker qualifies for a religious or health exemption? What accommodations can an employer offer a worker?

According to the health order, the operator of the health facility determines whether an employee meets the requirements for an exemption. However, CHA advises hospitals to work with their counsel to develop policies around accepting or rejecting a claim of health or religious exemption. Both categories are covered under the anti-discrimination provisions of the Fair Employment and Housing Act, and therefore entail potential legal liability.

In terms of exemptions, CHA advises hospitals to develop specific accommodations in alignment with their policies. However, some general accommodations are available to a hospital, including:

- Continuing the masking and testing requirements in the July 26 health order
- Reassigning the worker to a work-from-home position
- Reassigning the worker to a position that is not covered by the health order and does not include patient care areas
- If no other accommodations are safely available, sending the worker home without pay until conditions change or the worker agrees to vaccination
- Termination

29. [Can I implement an accommodation that is less protective than the July 26 health order?](#)

No. At a minimum, every facility must meet the requirements of the July 26 health order.

30. [Can a hospital require its employees to wear a sticker on their badge denoting the employee's vaccine status?](#)

The EEOC issued guidance in May 2021 advising employers that vaccination status is considered confidential medical information. Therefore, a mandatory sticker policy may violate the employee's right to medical confidentiality. Prior to requiring the use of stickers on badges, CHA advises hospitals to work with their counsel to determine whether a sticker policy would run afoul of EEOC guidance.