

# The current state of COVID vaccines and testing

Even today, more than two years after the COVID-19 pandemic began and COVID-19 vaccinations became readily available, a single employee with a coronavirus infection can still threaten an entire business operation. That's especially true in a health care setting. A workplace outbreak can trigger widespread COVID-19 testing, co-worker anxiety, requests for telework, absenteeism, and demands for reasonable accommodations from potentially vulnerable employees. Worse, breakthrough infections regardless of vaccination status may sicken enough of your workforce to halt or impair operations. And some of those sick employees may remain ill for a prolonged period of time. Long-haul COVID has already been recognized by the EEOC as a potential disability under the ADA, requiring indefinite reasonable accommodations. Plus, its periodic nature means affected employees will typically be eligible for intermittent FMLA leave.

What does all this mean for employers? Even as much of the country has dropped mask mandates and vaccine passport requirements for entering public spaces, employers have to consider whether to loosen their own rules. New guidance from the Centers for Disease Control and Prevention (CDC) should serve as the minimum standard for workplace safety in most industries. But employers are also free in most states to keep or add stricter standards for their workplaces. Here's how to navigate the new, post-pandemic world.

## Vaccinations and immunization

On January 31, 2020, then-Health and Human Services Secretary Alex Azar declared a public health emergency because of the emerging threat SARS-COV-2 — the newly identified coronavirus — posed to the nation. The declaration allowed, among other things, the U.S. Food and Drug Administration (FDA) to fast-track authorization of COVID-19 treatments, tests, and vaccines. Shortly after, on March 11, 2020, the World Health Organization (WHO) officially declared a worldwide COVID-19 pandemic.

What followed was the fastest creation and testing of vaccines in history. By December 11, 2020 — exactly nine months after WHO declared the COVID-19 pandemic — public health officials at the FDA issued an Emergency Use Authorization (EUA) for the first vaccine for SARS-COV-2. That vaccine was the Pfizer-BioNTech COVID-19 Vaccine developed by Pfizer in conjunction with BioNTech — a German biotech startup. The Pfizer vaccination uses messenger RNA (mRNA) to trigger an immune response against the coronavirus that causes COVID-19.

A few days later — on December 18, 2020 — the FDA issued an EUA for the use of the Moderna COVID-19 Vaccine. It is also an mRNA vaccine. Both the Pfizer and the Moderna vaccines require health care professionals to administer two doses approximately one month apart. Both also must be kept at super-cold temperatures prior to administration.

Finally, on February 27, 2021 — a little less than a year after the WHO declared a pandemic — the FDA issued an EUA for the use of the Johnson and Johnson Janssen COVID-19 Vaccine. That shot is a traditional vaccine based on a modified coronavirus that triggers an immune response. It is a one-dose vaccination. Health care providers can administer it easily as it does not require low temperature refrigeration like the Pfizer and Moderna vaccines. It also does not require a second dose.

Since the emergency use authorizations made vaccinations widely available, the CDC and the FDA have added recommendations for booster shots. For those who received the J&J shot, the U.S. Government has recommended a booster of either Pfizer or Moderna. Those who received one of the mRNA vaccines may receive a booster of either one.

## **COVID testing and workplace policies**

Since the inception of the COVID-19 pandemic, the CDC has issued guidance for employers on how to identify and prevent worker infections. These include the use of a COVID-19 viral test and subsequent recommendations following a positive test result. The CDC has also made recommendations about when employees may return to work. During the first two years of the pandemic, the CDC recommended that before returning, employees present the results of a negative COVID-19 test.

### **Since late February, the CDC has relaxed its guidance. The current guidance says:**

- Masks are optional for everyone in indoor public settings except in healthcare facilities and on public transit.
- For those whose COVID-19 test results are positive, the CDC now recommends staying home and isolating for five days. Previous guidance recommended not returning to work without a negative COVID-19 test.
- For workers exposed to someone who has a positive test, the recommendation no longer requires isolation and testing provided they are fully vaccinated, including a vaccine booster. For un-and-under vaccinated workers, the CDC still recommends a COVID-19 test at day five. If that yields a positive test, the worker would isolate for five days.
- Employers should also frequently check the CDC website for updates at [cdc.gov](https://www.cdc.gov)

### **Should you follow the CDC's guidelines?**

It is a legal best practice to follow CDC guidelines. But they are just that — guidelines. Not adhering to isolation guidelines, in particular, could create legal exposure should a worker or customer become sick or die. If an employer knows there was a positive test, in some states that could be viewed as gross negligence or even potentially an intentional tort. That could take the case out of the realm of workers comp and into state tort law or worse, with the potential for unlimited damages.

### **Who pays for testing?**

If you do require employees to take COVID tests as a condition of their employment, where the burden of the expense falls is still a bit up in the air. Currently, all health insurers are required to reimburse covered parties for up to 8 tests per month, which may be enough to cover an employee's needs. Whether employers can require workers to get their tests through insurance is unclear and will depend on state law as well as interpretations of the FLSA. For example, California requires employers to pay for job-related testing. Plus, if testing at the workers' expense throws their pay below minimum wage that may violate the FLSA. When making such decisions, it's important to do so carefully and to consult any state or local laws.

Can you request proof of illness?

If an employee claims to be COVID positive and that they need to isolate, follow whatever rules you normally have for leave requests for illness. While you may fear that employees could use COVID as an excuse for a few days off, you should be cautious about coming down too hard on individuals. Still, if you would normally require proof of illness for an employee to be out for several days, then requesting evidence of a positive test would be in-line with normal practices. The key is consistency.

Finally, it's best to check for any special rules in your city or state, as there may be additional considerations including mandated paid or unpaid leave.

## Vaccination mandates

With the exception of health care settings under the jurisdiction of the Department of Health and Human Services, there is no legal requirement for employers to mandate COVID-19 vaccinations for employees. But employers are free to make vaccination and boosters a condition of employment in most states. And all state health departments recommend COVID-19 vaccination for all adults. Employers who want to create or continue with a vaccine requirement should include the following information in their policies:

- **Keep vaccination information confidential.** Under the ADA and the FMLA, among other U.S. government rules, employers must keep medical records confidential. That means taking care to separate vaccination records from ordinary personnel records. If employees upload documentation such as a vaccination card to the HR office, you should save the vaccine documentation to a confidential medical record file. This should be your standard proof of vaccination protocol.
- **Handling religious and medical exemptions.** Employers are required under Title VII's religious discrimination provisions and under the ADA's disability discrimination provisions to reasonably accommodate exceptions to vaccine mandates. When workers make an exemption request on either ground, employers are entitled to additional information to confirm the request. For example, employers may inquire into the religious objection but cannot dismiss the request out of hand. A reasonable accommodation might include allowing unvaccinated workers to telework.
- **Develop a frequently asked questions resource.** If you are requiring vaccination, it's a good idea to maintain a frequently asked questions (FAQ) database. You can include FAQ in the employee handbook and include information on how to submit proof of vaccination as well as instructions for requesting a reasonable accommodation. Include a phone number in the FAQ.

## Documents and policies

### Updating your handbook

Employers should have created a temporary pandemic section in their handbooks (if you haven't, there's no time like the present). This section should be updated regularly whenever there are changes made to the policy. It's a good idea to at least review Covid policies whenever the CDC, OSHA, EEOC, or a state agency updates their guidance.

### Record keeping

Employers in the health care industry must follow any rules laid out by HHS. However, for others things are less clear-cut. There is no requirement to keep specific records or records of positive/negative tests for employees, as long as any records kept are treated consistently and confidentially. However, it may be in your best interest

to do so, as these records could be important evidence in case a COVID-related lawsuit ever came up.