



**NEW MEXICO
STATE PERSONNEL OFFICE**

**SPO GUIDANCE
EXECUTIVE ORDER 2021-046**

**-- QUESTIONS & ANSWERS --
SET 1**

TESTING

If an employee has received their first COVID-19 vaccination, are they exempt from the testing requirement of Executive Order 2021-046?

No. Employees in the process of pursuing full vaccination are not exempt from the testing requirement until they are Fully Vaccinated and have submitted Proof of COVID-19 Vaccination. "Fully Vaccinated" means that two weeks have elapsed following the receipt of one dose of a single-dose vaccine or following the receipt of the second dose of a two-dose vaccine. "Proof of COVID-19 Vaccination" means a CDC vaccine card or a vaccine record from the New Mexico Statewide Immunization Information System, indicating the name of the vaccine recipient, the date(s) the vaccine was administered, and which COVID-19 vaccine was administered. (SPO Guidance - Revised 8-30-21 Section 3.)

If an employee is unable to receive a COVID-19 vaccine due to a medical condition, are they exempt from the testing requirement of Executive Order 2021-046?

No. A medical exemption from COVID-19 vaccination is different than a medical exemption from COVID-19 testing. Employees with a medical exemption from COVID-19 vaccination are not automatically exempt from the testing requirement.

If an employee previously contracted COVID-19, are they exempt from the testing requirement of Executive Order 2021-046 for 90 days after they recover?

No. Employees are not exempt from the testing requirement because they previously contracted and recovered from COVID-19. According to the CDC, previous infection-acquired immunity may not prevent infection from new COVID-19 variants. Also worth noting, according to the CDC, COVID-19 vaccines offer better protection than natural immunity alone and help prevent reinfections. (<https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e1.htm>; <https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html>).

If an employee is teleworking, are they exempt from the testing requirement of Executive Order 2021-046?

No. Employees are not exempt from the testing requirement because they are teleworking. (*SPO Guidance - Revised 8-30-21, Section 5.2(f).*) The testing requirements of Executive Order 2021-046 apply to all State employees. In addition, *the Non-Mandatory Telework Policy* requires teleworking employees to be able to report to their normal worksite on three hours' notice; employees can only fulfill this policy requirement if they maintain compliance with the Executive Order's testing requirements.

If an employee is on leave, are they exempt from the testing requirement of Executive Order 2021-046?

Yes, in part. The revised SPO Guidance addresses this situation: "State employees who are not Fully Vaccinated, or who are unwilling or unable to provide Proof of COVID-19 Vaccination, and who are on pre-approved leave (including but not limited to annual leave, sick leave, Family and Medical Leave Act leave, and Paid Parental Leave) are excused from the testing requirement during their leave, except such employees must provide Proof of COVID-19 Test no later than 5:00 p.m. on the Wednesday before any work week during which they will be returning to work for any amount of time, ***even if that Wednesday is during their leave.*** The goal is to have employees resume testing the week ***before*** they return to work. State employees who are on COVID-19-Related Conditions Leave must comply with the testing requirement during their leave. Beginning September 7, 2021, employees shall use the COVID-19 Testing TRC 'CVTST' when testing pursuant to Executive Order 2021-046."

Please note, however, that State employees who are on COVID-19-Related Conditions Leave must comply with the testing requirement during their leave. (*SPO Guidance - Revised 8-30-21, Section 5(j).*)

Is COVID-19-Related Conditions Leave available for required testing?

No. COVID-19-Related Conditions Leave is not available for the testing required by Executive Order 2021-046. As the SPO Guidance states, "To minimize impact to business operations while complying with Executive Order 2021-046, employees are encouraged to take a Vault Health COVID-19 test during regular work hours at their normal worksite or telework location (<https://learn.vaulthealth.com/nm>). If an employee cannot secure Vault Health testing, they must obtain approval from their supervisor prior to taking an alternative COVID-19 viral test during working hours. Beginning September 7, 2021, employees shall use the COVID-19 Testing Time Reporting Code (TRC) 'CVTST' when testing pursuant to Executive Order 2021-046." (*SPO Guidance - Revised 8-30-21, Section 5.2(i).*)

Please note that while COVID-19-Related Conditions Leave is not available for testing pursuant to Executive Order 2021-046, it may still be available, at the agency's discretion, for the conditions outlined in State Personnel Office General Memorandum 2020-004.

Can an employee be disciplined if their weekly COVID-19 test result is positive?

No. An employee who is not Fully Vaccinated, or who is unwilling or unable to provide proof of vaccination, can be disciplined for not providing proof of a COVID-19 test every week, but cannot be disciplined for failing to provide a negative test result or for providing a positive test result. (*SPO Guidance - Revised 8-30-21, Section 5.3(c).*)

Is the State paying for State employees' COVID-19 required testing?

Free testing is still available in New Mexico at this time, for example through Vault Health (<https://learn.vaulthealth.com/nm>).

Should State of New Mexico job postings indicate the testing requirement for State employees?

Yes. State Personnel has added language addressing the testing requirement to the Conditions of Employment on State of New Mexico job postings and will work with agencies to incorporate the language into live ads as well.

Can employees request an exemption from the testing requirement based on religious belief?

Yes. An agency is required to reasonably accommodate an employee's sincerely held religious belief or practice, unless the accommodation places an undue hardship on the agency. Upon learning of an employee's possible need for a sincerely held religious belief exemption/accommodation, agencies should engage in the interactive process and make a good-faith effort to discuss the employee's specific circumstances and their limitations around COVID-19 testing. Employees requesting a religious exemption/accommodation can be asked to provide an explanation of their sincerely held religious beliefs and a statement regarding the manner in which the administration of a COVID-19 test conflicts with their sincerely held religious belief or practice. In determining whether to grant a religious exemption or what form of religious accommodation to grant, please also keep in mind that the New Mexico Religious Freedom Restoration Act allows agencies to restrict a person's free exercise of religion to further a compelling governmental interest, such as minimizing the transmission of COVID-19 and protecting the public health and safety, but only when the restriction is the least restrictive means of furthering that interest. (NMSA 1978, Section 28-22-3.) A template religious exemption-accommodation request form is attached below.

Do the testing requirements of Executive Order 2021-046 apply to contractors or Board members?

Executive Order 2021-046 applies to State employees only. (*SPO Guidance - Revised 8-30-21, Section 1.*) However, Section 5.1(D)(2) of the *COVID-19 Mitigation, Self-Screening, and Reporting Policy and Procedure (Revised 7/9/21)* allows an agency to administer COVID-19 screening to members of the public, including contractors and Board members, who seek to enter the agency's buildings. In addition, agencies are encouraged to ask contractors to voluntarily comply with the testing requirements of the Executive Order for all contract workers who report to State buildings and facilities on a regular basis. Contract workers should submit any testing (or proof of vaccination) records to their direct employer, the entity contracting with the State.

MASKING

Does Executive Order 2021-046 require State employees to wear masks when sitting alone in private offices?

No. State employees are required to wear masks in all Common Areas, which the SPO Guidance defines as “[a]ny areas of State buildings, facilities, or property generally accessible to all occupants and available for use by more than one person, including but not limited to: entrance areas, hallways, conference, rooms, auditoriums, multi-occupant office, kitchens, bathrooms, and State vehicles.” But they are **not** required to wear masks when they are alone in single-occupant offices and cubicles. (*SPO Guidance - Revised 8/30/21, Section 3.*)

Do the masking requirements of Executive Order 2021-046 apply to contractors or Board members?

Executive Order 2021-046 applies to State employees only. (*SPO Guidance - Revised 8-30-21, Section 1.*) However, the August 17, 2021 Public Health Order (on Masking) requires all individuals, including contractors and Board members, to wear a mask or multilayer cloth face covering in all indoor public settings except when eating or drinking or when a healthcare provider instructs otherwise.

GENERAL

Is there any guidance on the level of discipline that should be imposed for a violation of Executive Order 2021-046?

No. Each agency is responsible for determining the appropriate discipline and the appropriate steps of progressive discipline to impose on employees who violate the Executive Order. As always, please ensure that discipline is imposed consistently across employees within your agency.

Will there be additional revisions to the COVID-19 Mitigation, Self-Screening, and Reporting Policy and Procedure based on Executive Order 2021-046?

Yes. The State Personnel Office is in the process of revising the *COVID-19 Mitigation, Self-Screening, and Reporting Policy and Procedure (Revised 7/9/21)*. A revised Policy will be issued after negotiations with the unions.

Should COVID-19-Related Conditions Leave be denied to employees who are not Fully Vaccinated?

Pursuant to SPO General Memorandum 2020-004, the decision to grant or deny COVID-19-Related Conditions Leave has always been within an agency's discretion. If your agency has been granting COVID-19-Related Conditions Leave to unvaccinated people up to this point, but now wishes to deny COVID-19-Related Conditions Leave to employees who do not provide Proof of Vaccination under Executive Order 2021-046, that is a change your agency has authority to make. In that case, please ensure your employees know there has been a shift in your COVID-19-Related Conditions Leave analysis and, as always, apply the new analysis consistently across all employees in your agency going forward. Please also note that while an agency may decide it makes sense to deny COVID-19-Related Conditions Leave to unvaccinated employees who test COVID-19-positive, have COVID-19 Symptoms, or are Exposed to laboratory-confirmed COVID-19, State Personnel recommends that COVID-19-Related Conditions Leave requested by employees whose children's schools close due to a COVID-19 outbreak (and who cannot telework) be granted, regardless of the employee's vaccination status.