



**NEW MEXICO
STATE PERSONNEL OFFICE**

**SPO GUIDANCE
EXECUTIVE ORDER 2021-066**

**-- QUESTION & ANSWER --
SET 1**

The answers provided in this Question & Answer Set 1 on SPO's Guidance on Executive Order 2021-066 supersede the answers provided in the Questions & Answers Set 1 on SPO's Guidance on Executive Order 2021-046 and the Questions & Answers Set 1 on SPO's Guidance on Executive Order 2021-057. -

TESTING

If an employee has received their first COVID-19 vaccination, are they exempt from the testing requirement of Executive Order 2021-066?

No. Employees who are only Partially Vaccinated and have not yet completed their Primary Series of 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. Additionally, please note that while Fully Vaccinated employees are exempt from the testing requirement of Executive-Order 2021-066 for a period of time, they will later have to comply with the testing requirement if they fail to obtain a Booster Dose of COVID-19 vaccine by January 17, 2022, or within four weeks of becoming Eligible for a Booster Dose, until they receive a Booster Dose. (*SPO Guidance 12-10-21, Section 5.3(a) and (b).*)

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 2021-066?

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 contracts COVID-19, are they exempt from the testing requirement of Executive Order 2021-066 for 90 days after they recover?

Yes. Any employee who is required to test pursuant to Executive Order 2021-066 and tests positive for COVID-19 shall be exempt from the testing requirement of Executive Order 2021-066 for a period of 90 days following the date of the employee's positive COVID-19 result. In addition, such employees do not need a negative COVID-19 test result to return to work. Rather, they can return to work provided they have completed the mandatory isolation period prescribed by the agency's *COVID-19 Mitigation, Self-Screening, and Reporting Policy and Procedure* or by the New Mexico Department of Health, whichever requires a longer isolation period. (*SPO Guidance 12-10-21, Section 5.3(k).*)

If an employee is teleworking, are they exempt from the testing requirement of Executive Order 2021-066?

No. Employees are not exempt from the testing requirement because they are teleworking. (*SPO Guidance 12-10-21, Section 5.3(c).*) The testing requirement of Executive Order 2021-066 applies 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. This requirement underscores the necessity of teleworking employees maintaining compliance with the Executive Order's testing requirement. If they are out of compliance with the testing requirement, they will not be able to report to their worksite when needed. (*SPO Guidance 12-10-21, Section 5.4(c).*)

If an employee is on leave, are they exempt from the testing requirement of Executive Order 2021-066?

Yes, in part. The SPO Guidance addresses this situation: "State employees who are not Fully Vaccinated, are unwilling or unable to provide Proof of COVID-19 Vaccination, are Partially Vaccinated, or are Eligible for a Booster but have not received a Booster Dose by January 17, 2022, or within four weeks of becoming Eligible for a Booster, 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."

Please note, however, that State employees who are on COVID-19-Related Conditions Leave or administrative leave pending investigation or disciplinary action for failure to comply with a COVID-19-related Executive Order or Public Health Order must comply with the testing requirement during their leave. (*SPO Guidance 12-10-21, Section 5.3(f).*)

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 2021-066. As the SPO Guidance states, "To minimize impact to business operations while complying with Executive Order 2021-066, 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.” (SPO Guidance 12-10-21, Section 5.3(e).)

Please note that while COVID-19-Related Conditions Leave is not available for testing pursuant to Executive Order 2021-066, it may still be available, at the agency’s discretion, for the conditions outlined in State Personnel Office General Memorandum 2020-004.

Should the COVID-19 Testing Time Reporting Code (TRC) ‘CVTST’ be used for all employee COVID-19 testing?

No. The COVID-19 Testing TRC ‘CVTST’ is only for COVID-19 testing pursuant to Executive Order. (SPO Guidance 12-10-21, Section 5.3(e) and (f).) In other cases of employee COVID-19 testing, the agency has discretion to grant the employee administrative leave to test pursuant to State Personnel Board Rule 1.7.7.14(A) NMAC. COVID-19-Related Conditions Leave may also be available for employees experiencing symptoms of COVID-19 and awaiting results of a COVID-19 test. Please ensure that administrative leave for COVID-19 is granted consistently across employees within your agency.

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

No. An employee who is required to test pursuant to Executive Order 2021-066 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 12-10-21, Section 5.3(d).)

When an employee fails to provide Proof of a COVID-19 Test weekly as required, do they have to be removed from work duties?

No. An employee who is required, but fails, to test every week pursuant to Executive Order 2021-066 must be removed from the **workplace** until they provide the required Proof of COVID-19 Test. (SPO Guidance 12-10-21, Section 5.4(c).) However, employees must continue to perform their **work duties** whenever possible. Employees who have an approved telework arrangement must continue to telework. If telework is not an option, an agency may place an employee on administrative leave pending disciplinary action pursuant to 1.7.11.12 NMAC or, alternatively, an agency may consider the employee Absent Without Leave (AWOL), if the agency’s AWOL policy supports that determination, for example, by defining AWOL as a failure to meet the agency’s readiness for work requirements.

Is the State paying for State employees’ COVID-19 tests?

Free COVID-19 tests are 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 religious 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.)

Do the testing requirements of Executive Order 2021-066 apply to contractors or Board members?

Executive Order 2021-066 applies to State employees only. (*SPO Guidance 12-10-21, Section 2.*) However, Section 5.1(D)(2) of the *COVID-19 Mitigation, Self-Screening, and Reporting Policy and Procedure (Revised 9/8/21)* 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 who report to State buildings and facilities on a regular basis to voluntarily comply with the testing requirements of the Executive Order. 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 2021-066 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 with the door closed. (*SPO Guidance 12-10-21, Section 3.*)

Do the masking requirements of Executive Order 2021-066 apply to contractors or Board members?

Executive Order 2021-066 applies to State employees only. (*SPO Guidance 12-10-21, Section 2.*) 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 2021-066?

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 2021-066?

Yes. The State Personnel Office is in the process of revising the *COVID-19 Mitigation, Self-Screening, and Reporting Policy and Procedure (Revised 9/8/21)*. 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 COVID-19 Vaccination under Executive Order 2021-066, 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.